

Internet dispute resolution.

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Internet Dispute Resolution

PhD Thesis

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1. Declaration

I declare that the work presented in this thesis is my own.

.....

Signature

2. Abstract

This thesis develops a model for the fair resolution of internet disputes. The internet has the potential to lead to international, cross-border disputes, being a powerful communications medium, that allows data exchanges in various media formats between a wide range of different users situated in distant locations. It explores the meaning of fairness for the resolution of such disputes.

This thesis refers to the existing literature examining the private international law issues arising from cross-border interactions and transactions on the internet which make litigation and enforcement more costly and lengthy.

For many disputes arising on the internet, alternative ways of resolving such disputes have to be found. This thesis contains a detailed exploration of the use of mediation and arbitration, using online technology, obviating the need for the parties and lawyers to meet face-to-face and leading to more efficient information processing, and thereby reducing cost and delay in dispute resolution.

Binding dispute resolution and enforceability in cross-border cases are important for internet disputes and can be provided by online arbitration. Therefore, this thesis proceeds to examine in great detail the legal issues surrounding online arbitration. It looks at questions of due process in arbitration and covers the legal issues surrounding business-to-consumer arbitration comparing the European approach to that in the US. The thesis contains a detailed analysis of the Uniform Domain Name Dispute Resolution Procedure (UDRP) and considers to what extent the dispute resolution model established by the UDRP could or should serve as a model for other types of internet disputes.

The conclusion from this examination of all aspects of internet dispute resolution is a model of dispute resolution, which encourages the use of online arbitration for internet disputes, but, where there exists a substantial power imbalance between the disputants (such as the traditional business-to-consumer paradigm), subjects traditional commercial arbitration to more stringent due process standards for disputes.

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Chapter 1 : The Dissertation

1. Introduction

In the year 1532, Michael Kohlhaas¹, described as an honest and law-abiding Brandenburg merchant, was on his way to an important trade fair in Leipzig. At the border post with Saxony, two of his horses are unlawfully seized and his stable boy is beaten by the local squire. Michael Kohlhaas later seeks justice in the local courts but is denied civil redress. He gathers a gang of rebels, eventually commits murder and burns down and pillages houses in the Saxon squire's town. As the story progresses, his crusade becomes more and more excessive. He loses his wife, his possessions and finally his life when he is executed some eight years later.

The story of Michael Kohlhaas and his frustrated quest for justice are proverbial in Germany and reflect how, in an extreme case, an unresolved dispute can slowly escalate to a cross-border bloodshed. If he had obtained a remedy at the outset of the story this bloodshed and destruction could have been avoided. This story is relevant to the internet, since, as this thesis will show, the internet brings persons interacting from different countries into conflict with each other, sometimes without access to redress through the state courts. This thesis examines how cross-border internet disputes for which the state courts cannot provide redress can be solved fairly.

2. The Subject

The starting point for the thesis was the legal and practical obstacles to dispute resolution placed by the traditional rules on jurisdiction and enforcement in cross-border internet cases. These obstacles make it disproportionately expensive and

¹ Novella by Heinrich von Kleist (1777-1811)

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complex to litigate and enforce small claims in internet disputes.² In business-to-business (B2B) disputes the parties frequently use alternative forms of dispute resolution (ADR). This raises the question whether it is fair to transplant this model used in B2B disputes to all internet disputes. In answering this question the thesis develops a Model for the fair resolution of internet disputes.

The reader may find a discussion of what are the relevant internet disputes in Chapter Three. Essentially, this thesis is primarily concerned with (i) small³ cross-border internet disputes, where (ii) the parties are subject to a power imbalance.

This question about fairness means that the thesis places special emphasis on internet disputes where the parties are subject to a power imbalance.⁴ The power paradigm for internet disputes as defined in this thesis is wider than (but inclusive of) the classic business-to-consumer (B2C) paradigm of consumer protection law. The definition of power paradigms can be found in Chapter Three. It encompasses all disputes where one party is an individual and the other party an incorporated entity.⁵

This raises the question whether small cross-border internet disputes between two individuals, such as two consumers (C2C) are covered.⁶ Since there is no power imbalance, such disputes are not as problematic from a fairness point of view. However, such disputes are important for the second generation internet⁷ and are not excluded from the scope of the thesis, as individuals have problems with gaining access to the courts in small claims internet cases and access is one of the

² Small claims are defined for the purpose of this thesis as a claim in a cross-border internet dispute where the costs of litigating and enforcing it across a border make it disproportionately expensive to do so. What figure this amounts to depends on the jurisdictions involved and has to be assessed on a case-by-case basis. Figures in Chapter 3-7 and also Chapter 8-5

³ The reference to the size of the dispute refers to the value of the claim

⁴ 2 -2.3.3 and 2-5 and 3-5 and 3-6

⁵ 3-6.3

⁶ See 3- 6.3

⁷ Taking into consideration the rise of user-generated content, auction platforms, social networking and other interactive web-services, peer-to-peer file sharing and other applications leading to interactions between individuals.

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elements of fairness.⁸ Therefore, the recommendations made in the Model described in Chapter Eight⁹ also address disputes between individuals.

In terms of methodology the thesis has been based on an extensive literature review, both in the legal and social science field¹⁰ and literature on jurisprudence and on legal analysis of primary legal sources, including a comprehensive and original review of relevant case law. The research focuses mainly on English and US law¹¹. These jurisdictions have been chosen, since there the debate on ADR and arbitration is most developed. In some instances the thesis also uses a wider comparative approach, drawing on the laws of other jurisdictions by way of example to illustrate particular points, where relevant. The law is up-to-date until 1. July 2007, unless stated otherwise.

3. The Hypothesis

The Hypothesis of this dissertation is that online arbitration is a suitable *binding* redress mechanism for disputes arising on the internet, but that for disputes between individuals or where the parties are subject to a significant power imbalance, the traditional arbitration model has to be *adapted* to implement due process standards. Accordingly, this thesis develops a Model for the resolution of internet disputes¹².

4. The Literature Review

The internet has the potential to lead to an increase in cross-border disputes, since the internet is a powerful communications medium, that allows data exchanges in various media formats between a wide range of different users situated in distant locations. Much has been written about the increase of direct cross-border

⁸ 2-2.3.1

⁹ 8-6

¹⁰ The latter mainly in respect of the forms and functions of ADR

¹¹ Looking mainly at federal law and some State law

¹² 8-6

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interactions enabled by the internet's borderless nature and the jurisdictional problems for internet disputes this causes.¹³

Readers may be aware of the substantial literature about the difficulty of applying private international law rules to the internet, from which many academics and practitioners have concluded that for small cross-border internet disputes, forms of dispute resolution other than traditional litigation have to be used.¹⁴ It should be pointed out here that the thesis concentrates on *extrajudicial* dispute resolution mechanisms. It does not examine in detail how *judicial* cross-border dispute resolution could be made more accessible (*eg* through greater adoption of technology, international judicial co-operation, investment of financial resources).¹⁵

ADR using online technologies, which has been given the term Online Dispute Resolution (ODR) has frequently been hailed as *the* solution to the internet's jurisdictional problems. In this context a whole new discipline on ODR has been formed, discussing the benefits and methods of using online technologies for dispute resolution.¹⁶

This is the state of the discussion at present. However, no-one has undertaken a systematic analysis of whether the current forms of ADR (transposed into ODR) are best suited to provide *fair* redress for internet disputants and whether and how ADR has to be adapted for this purpose.

The main concern of this thesis is *fairness* in the extra-judicial resolution of internet disputes. Accordingly, this thesis examines ODR from an ethical perspective. While it is accepted that the availability of ODR may enhance trust so that users engage in online activities and that ODR reduces transaction costs and hence creates greater

¹³ Bibliography to Chapter 3

¹⁴ Bibliography to Chapter 3

¹⁵ Topic for another thesis

¹⁶ Bibliography to Chapter 5

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wealth for the participants in an activity, this has not been the central focus or concern for this thesis.

Being concerned with fairness, it was necessary to review some of the philosophical approaches of what amounts to fairness in dispute resolution procedures. This part of the thesis is largely, but by no means exclusively, based on *John Rawls'* influential book *A Theory of Justice*.¹⁷ Having worked out the core ingredients of procedural fairness it was then necessary to look at some fundamental and basic concepts and questions in dispute resolution, such as what is a dispute and what is the function of different forms of ADR.¹⁸

This examination of the forms and functions of ADR has led to the conclusion that the thesis should mainly focus on online arbitration. The reason for this is not that mediation is unimportant, on the contrary, the thesis argues that mediation should, if practical, be attempted as it has the important function of filtering out disputes where a compromise can be found. The reason for the focus on arbitration was that arbitration is the only *binding* ADR form¹⁹ and therefore, in this sense, the only real alternative to court proceedings.²⁰

Therefore, this thesis focuses on fairness in arbitration and asks whether the model set by traditional commercial arbitration would be a suitable model for the resolution of internet disputes. For this purpose, a detailed examination of due process in arbitration²¹ and the law applicable in arbitration²² was necessary. As readers may perceive from the literature used, the topic of due process and human rights in arbitration is currently vigorously and critically discussed.²³

¹⁷ Bibliography to Chapter 2

¹⁸ Bibliography to Chapter 4

¹⁹ A more precise distinction has to be made between: binding nature of the ADR agreement, finality, *res judicata effect* and enforceability

²⁰ Taking a legal equivalence approach, rather than a functional equivalence approach. An examination of the legal issues arising from mediation warrant another dissertation.

²¹ Bibliography to Chapter 6

²² Bibliography to Chapter 4

²³ In particular the contributions by T Carbonneau, A Jaksic, C Jarroson, M Kurkela, W Park, G Petrochilos, W Robinson and B Kasolowsky. A Samuel and A Tweedale mentioned in the footnotes above

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Arbitration is based on the parties' agreement to use an alternative to the court system, in a way contracting out of the state court system. Arbitration is based on the premise that the parties should be free to solve disputes in the manner that they agree (the principle of party autonomy) and the waiver doctrine, *ie* the principle that the parties have waived their right to solve their dispute by litigation entailing full due process.

Since arbitration is a form of quasi-judicial dispute resolution, readers may find it surprising that the examination of arbitral due process in this thesis reveals that due process standards are lower than before the courts.²⁴ These lower due process standards may be justified by the waiver doctrine and the principle of party autonomy where the parties are of roughly equal bargaining power and both have voluntarily entered into the arbitration agreement. The aim of this thesis has *not* been to criticise *commercial* arbitration as traditionally understood.

However, the crucial point is here that the internet has changed the traditional paradigm. For many cross-border internet disputes the parties are not voluntarily choosing arbitration as a preferred way to solve disputes. Here, arbitration is not an *alternative* form of dispute resolution; it may well be the *only* practical form of dispute resolution. More importantly, arbitration is not voluntary where the parties are subject to a significant power imbalance and where one party imposes arbitration on the other.²⁵ To illustrate this point, the thesis reviews²⁶ previous research in relation to other non-consensual forms of arbitration, such as the UDRP²⁷ and consumer arbitration.²⁸

²⁴ Chapter 6

²⁵ 7-1 and 7-2

²⁶ Chapter 7

²⁷ The UDRP is not strictly speaking arbitration- by way of analogy

²⁸ Bibliography to Chapter 7

5. The Contribution

The original contribution of this thesis is the finding that online arbitration modelled on commercial arbitration is not fair for internet disputes involving individuals and in particular, where there is a significant power imbalance between the parties²⁹. The research having crystallised that arbitration has to be adapted for such internet disputes, this thesis explains that a new model is needed to make online arbitration fair for such disputes. This thesis establishes a Model for the resolution of internet disputes, which encourages the use of online arbitration for internet disputes, but subjects traditional commercial arbitration to more stringent due process standards. The thesis defines the relevant power imbalances and sets out minimum due process standards based on the experience with commercial arbitration, the UDRP and consumer arbitration, and projects how these standards could be implemented in the future.

Most books in the ODR field are purely descriptive (describing what Online Dispute Resolution is and its benefits), written from the viewpoint of ADR practitioners. By contrast, this thesis proceeds from the viewpoint of internet law and regulation and the specific challenges that the internet poses for dispute resolution. At the same time it contains a very detailed, rigorous and practical analysis of arbitration law and due process and applies this profound analysis to internet disputes.

The original contribution to the current debate on ODR is that the thesis (i) recognises the value of online arbitration for the resolution of internet disputes (ii) proposes how to bring the parties before the online arbitrator (iii) synthesizes the current thinking on private international law, internet regulation, dispute resolution, ADR, ODR and due process in arbitration, (iv) establishes a theory of how the traditional arbitration model needs to be adapted to suit the challenges posed by the

²⁹ Defined as a dispute between a corporate entity and an individual

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internet and (v) develops a comprehensive and profound Model for fair dispute resolution on the internet.

Chapter 2 : The Concepts of Fairness

“An appreciation of unfairness develops early. A child of five, perhaps younger, is likely to know the meaning of unfairness (...). What any child might have more difficulty in doing is to give expression to the converse notion, the idea of fairness. Unfairness shouts out. Fairness goes unremarked.”

(JG Riddall Jurisprudence (Butterworths London 1999) 196)

1. Introduction

This thesis is concerned with the fair resolution of internet disputes. It is necessary to define procedural fairness at the outset.³⁰

First it is necessary to distinguish procedural fairness from distributive fairness. The latter is concerned with the allocation of resources³¹, whereas procedural fairness is not concerned with the outcome of the allocation, but the procedure of getting there.³² Therefore, a theory on dispute resolution (such as this thesis) is about procedural fairness. Hence, this thesis does not explore the issues of fairness of substantive laws and distributive justice.

Fairness is an extremely amorphous and elusive notion and it is frequently used in an emotive way. While most people have an instinctive idea about a procedure

³⁰ The terms ‘fair’ and ‘just’ and ‘fairness’ and ‘justice’ are used interchangeably in this thesis- it seems that there is little difference in meaning, see also HLA Hart *The Concept of Law* (2nd Edition Clarendon Press Oxford 1994) 158: ‘most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words ‘fair’ and ‘unfair’

³¹ Such as property rights and their limitation, contractual entitlements and obligations, social security etc. Distributive justice is concerned with the fair allocation of resources.

³² A Tschentscher ‘The Function of Procedural Justice in Theories of Justice’ in K Röhl, S Machura (eds.) *Procedural Justice* (Ashgate Dartmouth Aldershot UK 1997) 105-119. 105-106

Chapter 2: The Concepts of Fairness

being ‘unfair’ or ‘unjust’, it is much more difficult to build a comprehensive concept of the converse: fairness in dispute resolution.

This Chapter builds a concept of fairness using the building blocks of the traditional principle of due process³³ and relates this to general theories of procedural fairness. In doing this, the theory of fairness adopted in this thesis leans heavily on Rawls’ Theory of Justice. However before looking at *Rawls* and legal due process, the following section starts by deliberating on the elements of procedural fairness in a more general manner.

2. Definition of Fairness in Dispute Resolution

By way of overview, this section puts forward that procedural fairness in dispute resolution should consist of three main principles: equal treatment, a rational approach to decision-making (adjudication³⁴, such as litigation or arbitration) or to negotiation (and mediation) and effectiveness, which in turn consists of general access and mechanisms to counter-balance existing procedural inequalities between the parties (‘the counterpoise’).

2.1 Equal treatment of the parties

The notion of equal treatment has been at the core of fair treatment.³⁵ A dispute resolution process, which disadvantages one of the parties, which prevents only one of the parties from advancing any evidence or which involves a decision-maker biased towards one of the parties is self-evidently unfair.

³³ The phrases ‘due process’ and ‘natural justice’ are used interchangeably with the same meaning. ‘Due process’ is more commonly used in the US and ‘natural justice’ more commonly in the English legal tradition, see HJ Friendly ‘Some Kind of Hearing’ (1975) 123 *University of Pennsylvania Law Review* 1267-1317, 1276

³⁴ The term ‘adjudication’ in this thesis is used as a neutral term to mean a form of dispute resolution involving a third party making a decision binding on the parties, and is to include arbitration, ombudsmen and litigation rather than in the meaning of ‘expert determination’.

³⁵ JG Riddall *Jurisprudence* (Butterworths London 1999) 197

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The *Oxford English Dictionary* defines fair as ‘treating people equally’³⁶. *John Rawls* in his *Theory of Justice* posits the greatest possible equality as the *first* founding principle of a just society.³⁷ He argues that this would be the first and foremost principle the imaginary founders of a just society would agree upon.

While equal treatment is an obvious ingredient of fairness it is only part of the picture. In addition there must be a qualitative element to dispute resolution.

2.2 A rational approach to dispute resolution

The second element of procedural fairness in dispute resolution is taking a rational approach to solving a dispute.

For *Lon Fuller* the defining characteristic of adjudication, particularly compared to other forms of social ordering such as voting, is participation by presenting proofs and reasoned argument and he therefore posits that the results from adjudication are subject to a high standard of rationality.³⁸

Dispute resolution consists of fact-finding processes, problem-solving and law application.³⁹ These processes should be governed by logic and reason, so that no irrelevant considerations are taken into account.⁴⁰

Applying the law in a rational manner also means that like cases should be treated in a like manner. Logic in applying and interpreting the law should determine when two factual scenarios are the same and should be treated the same and when two

³⁶ C Soanes and A Stevenson *Concise Oxford English Dictionary* (11th Edition Oxford University Press Oxford 2004)

³⁷ *ibid* 53

³⁸ L Fuller ‘The Forms and Limits of Adjudication’ (1978-79) 92 *Harvard Law Review* 353-409, 364, 366, 370

³⁹ As to the different types of dispute resolution and the processes they involve 4-3

⁴⁰ W Park *Procedural Evolution in Business Arbitration* (Oxford University Press Oxford 2006) 54

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factual scenarios are different and should be treated differently.⁴¹ Hence rationality implies a degree of regularity in law application.⁴² This is encapsulated by the principle of the rule of law. *HLA Hart* points to this close connection between due process and proceeding by rule.⁴³

Fact-finding processes should be in accordance with logic and accurate, for a decision based on wrong facts is by definition unfair. Therefore a rational approach to dispute resolution additionally involves a degree of accuracy as to the factual basis of any decision.⁴⁴

2.3 Effectiveness

A third element of procedural fairness in dispute resolution is the effectiveness of the procedure. Effectiveness means that a procedure leads to a decision or solution of a dispute. It consists of two elements: access and the counterpoise.

2.3.1 Access

If a dispute resolution procedure is so cumbersome, drawn out and expensive that a decision or solution is never reached or only after excessive cost and delay, this would mean that such a procedure is not fair.⁴⁵ This is encapsulated in the saying ‘justice delayed becomes justice denied’.

⁴¹ HLA Hart fn 30 159: ‘Hence justice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading precept is often formulated as ‘Treat like cases alike’; though we need to add to the latter ‘and treat different cases differently’.

⁴² See also L Fuller fn 38 380-381

⁴³ HLA Hart *The Concept of Law* (2nd Edition Clarendon Press Oxford 1994) 160

⁴⁴ The *Oxford English Dictionary* accords the expression ‘fair and square’ the meaning ‘with absolute accuracy, honestly and straightforwardly’; fn 36

⁴⁵ EU Recommendation 98/257/EC, Principle IV ‘Effectiveness’; see also the jurisprudence of the ECtHR finding that excessive delay is a breach of the right to a fair trial under Art.6 (1) ECHR, see *eg Hentrich v France* A Series No. 296-A (1994) 18 E.H.R.R. 440

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2.3.2 Counterpoise

While the principle of access looks at effectiveness of the procedure itself, the counterpoise takes into account obstacles to effective participation which are not inherent to the procedure, but arise from a party's inability to take part in the procedure on an equal footing. Thus the counterpoise is concerned with pre-existing power imbalances between the parties and consists of measures to reduce them. Formal equal treatment of the parties by the judge/mediator/arbitrator and a rational approach to dispute resolution are necessary, but not sufficient, if the parties cannot participate in the dispute resolution process on an equal footing because of pre-existing procedural power imbalances. For example if one party only has no access to legal advice, no experience in litigation and no financial resources to fight a case, he or she would be less equipped to take part in a dispute resolution procedure than the other party.⁴⁶

In particular, power imbalances are a problem for effectiveness since it is more likely that the dominant party imposes its terms on the weaker party.⁴⁷ Furthermore, the dominant party is less likely to agree to *binding* dispute resolution in the first place, if the weaker party is the claimant.⁴⁸

Therefore, it must be recognised that there should be some counterpoise to pre-existing power imbalances for the purposes of dispute resolution to enable equal participation by both parties.⁴⁹

⁴⁶ 3-5 (power in dispute resolution)

⁴⁷ 6-4.2.3 (a) (party autonomy)

⁴⁸ 8-2

⁴⁹ M Cappelletti 'Alternative Dispute Resolution Processes within the Framework of the World-Wide-Access-to-Justice Movement' 56 *The Modern Law Review* 282-296, 283; G Petrochilos *Procedural Law in International Arbitration* (Oxford University Press 2004) 128-129; L Nader 'Alternatives to the American Judicial System' 3-53, 29 and L Nader & C Shugart 'Old Solutions for Old Problems' 57-102, 64-65 in L Nader *No Access to Law* (Academic Press New York 1980)

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2.4 Conclusion

This section has introduced a concept of fairness in dispute resolution consisting of three main principles of equal treatment, rationality and effectiveness. Effectiveness is concerned with access and a counterpoise to existing procedural inequalities, as illustrated in Fig. 1. All three principles must be met to some minimum level to achieve fairness in dispute resolution.

In the next sections this conceptualisation will be deepened by synthesizing the traditional notion of due process and Rawls' Theory of Justice and Habermas' ideas about fair participation.

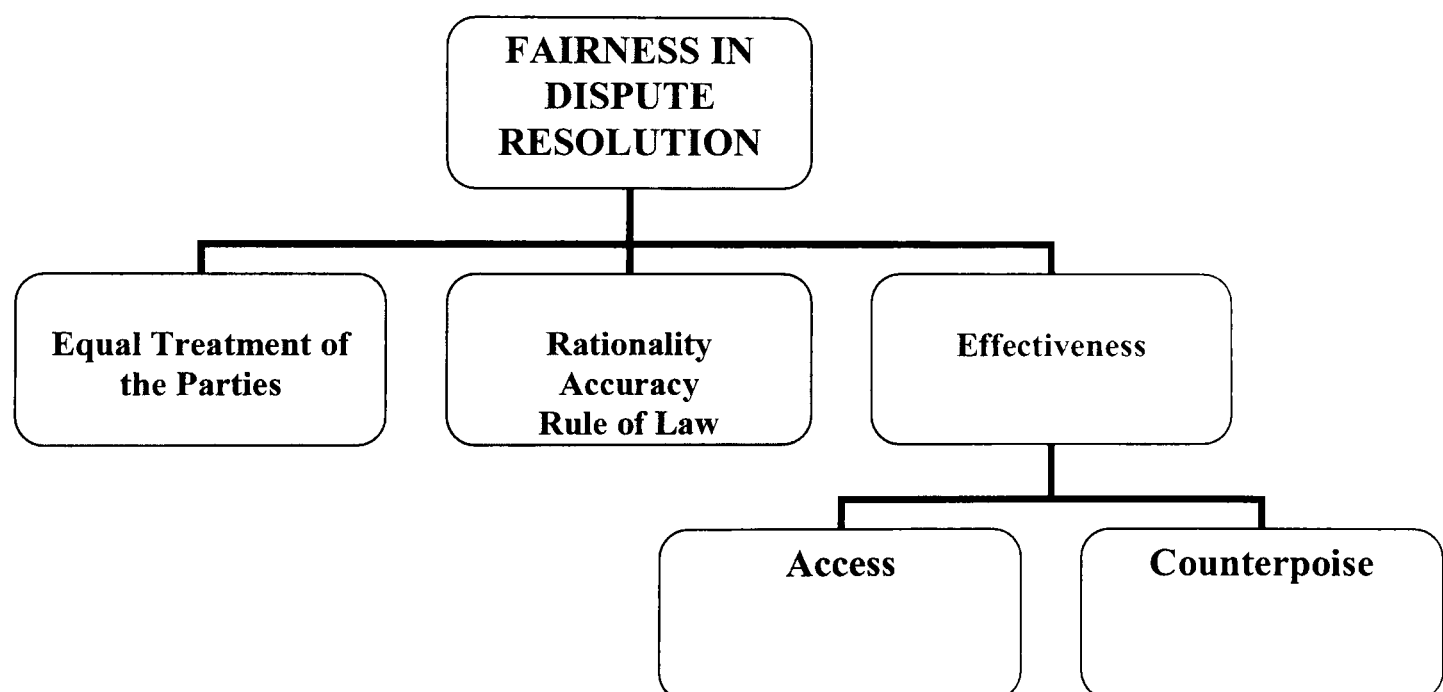


Figure 1: Fairness Definition:

Illustrating the main principles of fairness in dispute resolution

3. Process Values and Forms of Procedural Justice

Having enumerated the principles which make up the concept of procedural fairness, it may be worthwhile to pause for a moment and consider process values more generally. Process values are legal principles governing procedures (such as a

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rule against torture, for example). Process values have been extensively discussed in literature under the question whether they are important values in their own right or whether they are only important to the extent that they lead to a good outcome (such as a fair decision or a fair settlement). In other words the question to be answered is whether process values are to be judged according to the results they produce or whether they have a value independent of any result they engender.

3.1 Process values

Some US scholars have argued⁵⁰ that particular features of legal processes are ‘process values’ independent of whether or not these features contribute to better outcomes of legal processes. They argue that an infringement against such values would be wrong, even if the infringement leads to a ‘good outcome’⁵¹. The rationale behind this argument is that its verity is reflected in the saying that the ends do not always justify the means. In other words adherents to the theory of process values argue that certain features of legal processes must not be changed, even if they have no apparent positive effect on the outcome.

It is submitted that this vague concept of ‘process values’ is not particularly helpful.⁵² The notion of ‘process values’ in fact only describes the problem of balancing conflicting results caused by different processes. While the ends may not always justify the means, the means can *only* be judged by the effects they cause (balancing the intended results and the unintended effects).⁵³

⁵⁰ RS Summers ‘Evaluating and Improving Legal Processes-A Plea for “Process Values” (1974) 60 *Cornell Law Review* 1-52; MH Redish, LC Marshall ‘Adjudicatory Independence and the Values of Procedural Due Process’ (1986) 95 *Yale Law Journal* 455-505, 482-491; G Richardson, H Genn “Tribunals in Transition: Resolution or Adjudication”[2007] *Public Law* 116-141,120

⁵¹ The argument that infringement of process values is always wrong, is also unconvincing as it is never explained how to ascertain what amounts to a ‘good’ outcome.

⁵² DJ Galligan *Due Process and Fair Procedures* (Clarendon Press Oxford 1996) 9; Even John Allison, who supports the notion of ‘process values’ admits: ‘These values are a bit more slippery than instrumental ones such as accuracy, efficacy and efficiency (...) their amorphous nature also makes them less susceptible to consensus.’ ‘A Process Value Analysis of Decision-Maker Bias: The Case of Economic Conflicts of Interest’ (1995) 32 *American Business Law Journal* 481-540, 499

⁵³ See Art.by Jochen Bittner in Die Zeit http://www.zeit.de/2003/31/urteil_280703?page=all [on 14. September 2007]

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For example, if we imagine a (truthful) confession resulting from torture- it could (superficially) be argued that an unfair procedure (torture) has lead to a fair result (ascertainment of the truth) and that the apparently fair (intended) result does not make the unfair procedure fair. In fact, the torture has not only lead to a fair result, but also to unintended unfair results, in the sense that the torture left the tortured person psychologically and physically injured and upset the confidence in the legal system. Hence the positive and negative results of the procedure have to be carefully balanced. A recent case in 2003 has renewed the discussion about whether torture could ever be justified and undermines the absolute nature of process values: a law student named Magnus Gäfgen had kidnapped a boy from a banker's family for a ransom. When the police arrested and interviewed Gäfgen they thought that the victim may still be alive and would have to be found very quickly to save his life. When Gäfgen showed reluctance to admit the location of his victim the police threatened to cause him considerable pain. Gäfgen revealed the location of the victim and it turned out that he had murdered the boy. These illegal police tactics caused a loud outcry in Germany and demands that torture should never be used regardless of the circumstances. However the discussion largely overlooked that torture here was not used to obtain a confession for conviction (which would have been inadmissible in court) but in order to save another person's life. Balancing the boy's right to life with the right to bodily integrity of the accused may lead to the conclusion that torture could be justified in some very rare and extreme cases (albeit that it is far from clear whether torture is ever an effective means).

Legal processes are never an end in themselves, but are designed to lead to particular results (such as, *eg* ascertaining the truth or the correct and fair application of the law to the facts). The aim of a fair procedure is not the process itself, but the fact that it leads to a fair result and it is the result by which the procedure is judged.⁵⁴ Where a process has been tainted with unfairness, *eg* a biased judge, the result will be unfair, since there is a *risk* that the outcome may have been affected (since it cannot be shown with certainty whether or not the outcome was in

⁵⁴ See also DJ Galligan fn 52 65

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fact affected) and since trust in the integrity of the legal system has been undermined.⁵⁵

In other words, procedures have an instrumental or defining function they serve the purpose of making the process and its result fair.⁵⁶ This cannot be more clearly expressed than through Rawls' concept of procedural justice, which will be discussed in the next section.

3.2 The Rawlsian concept of procedural justice

John Rawls has distinguished between four forms of procedural justice.⁵⁷ For the first two forms (perfect procedural justice and imperfect procedural justice) it is clear what the *fair* outcome of the procedure would be and the purpose of the procedure is to achieve or approximate this outcome. In other words for perfect and imperfect procedural justice it can be objectively ascertained *a priori* what a fair outcome is and the procedure is *instrumental* in achieving this.

In particular, for cases of *perfect* procedural justice the procedure, if properly applied, realises the fair outcome. An illustration for this is the rule applied between two persons sharing a cake that one person cuts the cake into two pieces and the other chooses which piece he or she takes. In this case the fair outcome is equal treatment and this is achieved by the cake-cutter having an incentive to cut two pieces as equal as possible. In cases of *imperfect* procedural justice, the procedure has only an approximating function. In other words, here the procedure merely increases the chances of the fair outcome. Examples for this are fact-finding procedures in civil and criminal trials, where (part of) the fair outcome is finding the facts of what happened. However, these procedures are called imperfect, since the rules of evidence only imperfectly lead to the truth: 'the characteristic mark of

⁵⁵ *R v Sussex Justices, ex p McCarthy* [1924] 1KB 256 (Divisional Court) and 6-3

⁵⁶ DJ Galligan fn 52 62

⁵⁷ J Rawls *A Theory of Justice* (Revised Edition Oxford University Press Oxford 1999) 74-75, 176

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imperfect procedural justice is that while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it.⁵⁸

By contrast, for the other two forms of procedural justice, pure and quasi-pure procedural justice, rules are *defining* the outcome as being fair. Merely looking at the outcomes of these procedures it is not discernible whether or not the outcomes are fair-there is no independent criterion to assess whether or not the result is fair. In other words it is the design of the procedural rules and their correct application which *define* the outcome as being fair.⁵⁹

Pure procedural justice defines an outcome as fair, for example a game of chance allocating statistically equal chances of winning or losing to each participant. While it cannot be said that it is fair that this or the other participant wins, provided the rules have properly been applied, the outcome will be fair. *Quasi-pure procedural* rules also define the outcome as fair, but the rules might be contentious, as it is not statistically verifiable whether or not they lead to a fair result. According to *Rawls*, the function of quasi-pure procedural justice is to define the limits of discretion of a decision-maker for the selection of an outcome, which is merely one fair outcome of many possible other fair outcomes.⁶⁰

Applying *Rawl's* conceptualisation to dispute resolution, dispute resolution involves both fact-finding processes and processes requiring the exercise of discretion, such as contract bargaining (*eg* in mediation) and law applying (*eg* in adjudication, such as arbitration), for the latter to the extent that the application of law involves a power of discretion, *eg* in the application and interpretation of the law.

The fact-finding part of the processes should be governed by rules of imperfect procedural justice to ensure that there is a great likelihood that the facts are found out correctly. However, contract bargaining and the exercise of discretion in

⁵⁸ *ibid* 75

⁵⁹ DJ Galligan fn 52 62

⁶⁰ *ibid* 176

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applying and interpreting law require procedural rules to define them as fair. as it is impossible to discern from the outcome itself whether or not a particular interpretation of the law is fair or unfair.⁶¹

Lisa Bingham in her examination of the fairness of arbitration awards in employment arbitration emphasizes the difficulty of measuring the fairness in terms of distributive justice of the outcome and accuracy of fact-finding and law-applying in dispute resolution: ‘accuracy, both positive in the sense of correct fact finding and normative in the sense of correct application of decision standards is notoriously hard to measure in any dispute resolution process’.⁶² For this reason the standard of fairness has to be measured by the procedure. *Lon Fuller* also argues that the procedure of participation by presenting proofs and reasoned arguments by both parties *defines* the fairness and integrity of adjudication.⁶³

Imperfect procedural justice and quasi-pure procedural justice both deal with deficiencies in human knowledge- the procedure is instrumental to fill this gap in human knowledge. In other words we have no way to find the absolute factual accuracy nor have we any means of ascertaining what the right decision is in the sense of normative regularity, but only procedures, which we have good reason to believe, will lead to the right result. This deficiency of knowledge explains the importance of public confidence in legal procedures and notions such as ‘justice must be seen to be done’.⁶⁴

In conclusion, rather than defining absolute procedural values (such as process values), it is more helpful to regard dispute resolution processes as governed by two types of procedural rules: rules that are *instrumental* in establishing the truth underlying factual disputes and also rules *defining* the boundaries of a fair exercise

⁶¹ John R Allison fn 52 493

⁶² L Bingham ‘On Repeat Players, Adhesive Contracts, And the Use of Statistics in Judicial Review of Employment Arbitration Awards’ (1998) 29 *McGeorge Law Review* 223-259, 257-259

⁶³ L Fuller fn 38 364

⁶⁴ DJ Galligan fn 52 66, 72

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of discretion in applying and interpreting the law. The next section explains how due process realises both these functions.

4. Due Process⁶⁵

John Rawls considers the principle of due process as critical for securing the greatest equal liberty of citizens.⁶⁶ He maintains that ‘even in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social co-operation’.⁶⁷ Hence it is critical that these coercive powers are exercised in an impartial manner and in accordance with the rule of law.⁶⁸

The notion of due process (or natural justice) comprises the two fundamental principles that no-one should be a judge in his or her own cause, meaning that judges should be independent and impartial, and the principle of a fair hearing, meaning that each party should have an equal opportunity to present evidence and law.⁶⁹

The purpose of the principle of impartiality is to ensure that the judge treats the parties equally, maintains an open mind and does not take into account irrelevant considerations⁷⁰, hence contributing to equal treatment and the rationality of the decision and thereby to the fairness of the decision. An impartial mind is also required to ascertain the facts and is therefore a rule of imperfect procedural justice. But it is also a rule of quasi-pure procedural justice in that it means that the judge applies his or her discretion without pre-judgment or prejudice and therefore defines any resulting interpretation of the law as fair.

⁶⁵ Elements of due process, see Chapter 6

⁶⁶ J Rawls fn 57 210-211

⁶⁷ *ibid* 211

⁶⁸ *ibid* 210; for the argument that arbitration is coercive and should therefore comport with notions of due process 6-2.5

⁶⁹ SH Bailey, JPL Ching, MJ Gunn, DC Ormerod *Smith, Bailey and Gunn: On the Modern Legal System* (4th ed Sweet & Maxwell London 2002) 1315, 280- see also Chapter 6

⁷⁰ Further in 6-3

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Similarly the purpose of the principle of a fair hearing⁷¹ is to ensure that each party participates in the process and has an opportunity to present their side of the case, thereby ensuring equality between the parties and rationality of the ensuing decision, and hence, ultimately, fairness. Furthermore a fair hearing is instrumental to finding the facts underlying the case and can therefore be described as a rule of imperfect procedural justice. But to the extent that the parties present legal arguments the principle of fair hearing also leads to a balanced application of discretion and it is therefore also a rule of quasi-pure procedural justice.

The principle of due process has become so settled by now that it is easy to forget the underlying justification.⁷² In essence, the procedural principles encapsulated in the notion of due process ensure equal treatment and rationality and thus contribute to fairness.

While due process is concerned about equal treatment it ignores pre-existing inequalities between the parties. It gives each party a formally equal opportunity to participate, but ignores any difference in the parties' *actual ability* to participate.

5. The Difference Principle: Counterbalancing Existing Inequalities

John Rawls in his contract theory establishes two main principles for ensuring fairness in a well-ordered society.⁷³ As has been mentioned, the first principle is that of the greatest possible equal liberty, conferring equal basic rights and duties on all individuals. The second principle has two limbs, *ie* that there should be fair equality of opportunity and that the interests of the most disadvantaged groups of society should be advanced to close the gap between the most disadvantaged and the most advantaged:

⁷¹ See 6-4

⁷² DJ Galligan fn 52 64, 349

⁷³ *ibid* 53

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‘social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.’⁷⁴

John Rawls argues that these two principles would be chosen as the governing principles of justice by the imaginary founders of society (he calls this the original position), if they were not acting in their own self-interest. This absence of self-interest could be guaranteed by the founders wearing what he calls the ‘veil of ignorance’, *ie* they would not know their position in society, which groups or class they would belong to. *John Rawls* uses this fiction of the ‘veil of ignorance’ (which is in itself an example of quasi-procedural justice) to convince us that the resulting principles are fair.⁷⁵

Although equality is stipulated as a principle, it is also significant, that *Rawls* acknowledges that equality cannot be achieved by mere equal treatment. *Rawls*’ second principle demonstrates that it is necessary to counter-balance the inequalities existing in real societies. Hence in a *Rawlsian* sense, fairness is more than mere equal treatment. This argument that fairness transcends mere equality is a very important contribution to the conceptualisation of fairness.

Likewise, for *Jürgen Habermas* the defining (quasi-procedural) determinant of fairness is equal participation in legal discourses. This equal participation is more than the formal equality we have found in the notion of due process. In *Habermas*’ view it is critical that the parties can participate on an equal footing in legal processes.⁷⁶

⁷⁴ *ibid* 13

⁷⁵ *ibid* 118-122

⁷⁶ J Habermas *Faktizität und Geltung* (Suhrkamp Frankfurt am Main 1992) 187, 516

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Habermas effectively, like *Rawls*, argues that power imbalances must be levelled out through procedural fairness⁷⁷ and he expressly refers to *Rawls*'s quasi-procedural justice.⁷⁸ However *Habermas* assumes that this is less important for adjudication for the reason that judicial proceedings have institutionalised fair participation of both parties.⁷⁹ *Habermas* distinguishes between *negotiations* which *require* procedures to ensure that all interests are represented, that power imbalances are levelled out and that coercive powers do not prejudice the outcome⁸⁰ and judicial proceedings, which have already institutionalised legal discourses inbuilt⁸¹. Judicial proceedings define and limit the space in which the argumentation takes place: participation, roles, issues and the processes forming opinions and decisions are regulated. These procedural regulations are necessary to endue judicial proceedings with quasi-procedural justice.⁸² *Habermas* like *Rawls* argues that equal participation of the parties has to be guaranteed through procedural rules.

For dispute resolution, *Rawls*' and *Habermas*' theories mean that due process (as defined above: equal treatment and rationality) in itself is not sufficient. It is not sufficient to merely ensure that the parties are treated equally and that decisions are rational, accurate and according to the rule of law. In addition, in cases in which a significant power imbalance exists between the parties, fairness means that measures must be taken to redress this power imbalance to ensure equal participation by the parties. Therefore, the principle of due process in dispute resolution is only a *sine qua non* condition, but not sufficient to guarantee fairness of procedures. Additional steps must be taken to redress power imbalances. This requirement of a counterpoise to existing power imbalances is an important aspect of fairness which is neglected if one merely focuses on due process.

⁷⁷ *ibid* 205

⁷⁸ *ibid* 220

⁷⁹ L Fuller fn 38 366-367

⁸⁰ J Habermas fn 76 218

⁸¹ *ibid* 219

⁸² *ibid* 220

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Various methods can be used to redress such power imbalances, the most important of which are legal aid or other mechanisms which give the disadvantaged party greater access to redress (such as small claims procedures in consumer cases). Many of these mechanisms will be of a distributive nature (such as legal aid). A detailed discussion of these distributive mechanisms is outside the scope of this thesis, which merely focuses on procedural rules in extra-judicial dispute resolution.

Furthermore, this thesis only considers power imbalances in dispute resolution. It does not examine the existence of power imbalances generally and whether and how the substantive law should address or redress such power imbalances. In other words this thesis does not discuss whether there should be new substantive laws to redress power imbalances not recognised at present or whether the scope of coverage of some protective laws, such as consumer protection should be expanded.⁸³ This would be a topic for another examination.⁸⁴

Chapter Three discusses power imbalances in the context of internet disputes. It considers the factors giving power in dispute resolution and puts forward general criteria for legally determining the presence of a power imbalance between disputants. However, it would be costly and cumbersome to carry out such an assessment on a case-by-case basis for each dispute *ex post*. The approach has to be a general, *ex ante* approach which establishes an irrebuttable presumption that a power imbalance is present, if the parties have a certain status. This is the approach taken in consumer protection law. This will be further discussed in Chapter Three.⁸⁵

The following figure illustrates how the three elements of fairness discussed in the first section relate to due process and *Habermas*' and *Rawls*' theories:

⁸³ Briefly discussed in 3-6 for finding a definition for relevant internet disputes

⁸⁴ Substantive issues are excluded from the scope of this thesis. applicable law is included 4-4.5

⁸⁵ 3-6

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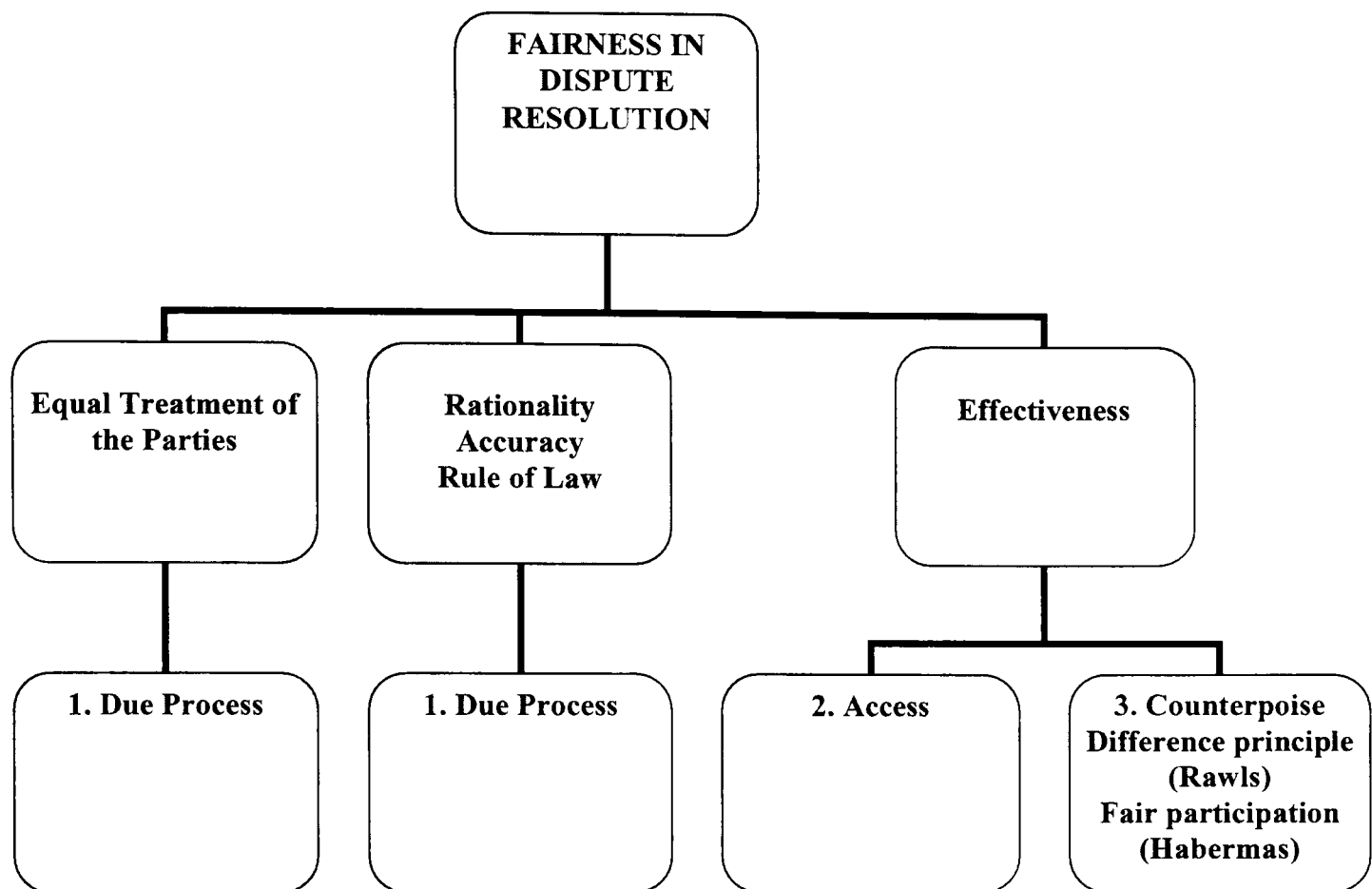


Figure 2: Due process and the Difference Principle

The next question is how the three elements of fairness relate to each other. The more all three elements of fairness could be augmented at the same time, the fairer the ensuing procedure would be. Regrettably, this may not be possible as the next section will explain.

6. The Inherent Conflict Between Due Process and Effectiveness

It is posited here that an inherent conflict exists between due process and effectiveness (access and the counterpoise). Due process requirements make legal procedures more elaborate and more strategic involving the expenditure of precious resources and time and are therefore apt to render legal processes lengthy and costly. They are thus likely to reduce the effectiveness of dispute resolution. Increased costs and delay, however makes procedures not only less effective and

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less accessible, but may also reinforce existing power imbalances⁸⁶. Increased costs and delay put the stronger party at an advantage and the weaker party at a disadvantage. Therefore, a high degree of due process in legal procedure necessitates even greater efforts at providing access and a counterpoise to existing inequalities. If such efforts are not made, a higher degree of due process may well be counter-productive for fairness. Since there is a limit to the extent to which it is possible to use resources to increase access and to counter-balance existing inequalities, there is logically also a limit to due process.

This conflict is reflected in *Axel Tschentscher's* criticism of *Habermas's* discourse theory and *Rawls's* contract theory. He argues that they are unrealistic in practice. Factually existing inequalities in society make equal and non-coercive participation in legal processes impossible.⁸⁷

Judge Friendly has also eloquently described this conflict between fairness and cost-effectiveness:

‘It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving.’⁸⁸

This conflict is also the underlying cause for the difficulty of balancing funding and fairness of dispute resolution procedures. If the procedure is expensive, access is restricted (in particular for a party with little resources, such as a consumer) or the cost might be disproportionate to the value of the claim. If the procedure is initiated, set-up, designed, financed and subscribed to by one stakeholder only (such as a business association in B2C disputes) it is likely that the procedure may not be

⁸⁶ 3-5 for power in dispute resolution

⁸⁷ A Tschentscher fn 32 114-115

⁸⁸ HJ Friendly fn 33 1276

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neutral and contrary to due process requirements. In the reverse, a procedure with limited due process which is fast and cheap is likely to be 'rough justice' and infringing on due process principles.

William Park tells the anecdote of a shoe shop in Boston which displayed a notice in a window listing the following characteristics of its service 'fast service' and 'low price' and 'high quality' with the caption 'pick any two'.⁸⁹ The same applies to dispute resolution.⁹⁰ Hence the challenge is to find the 'right' balance between due process and effectiveness.

However in the reverse it is also true to say that if effectiveness can be increased (for example through state funding⁹¹ or through technology⁹²) more due process can be afforded. Hence it can be argued that measures should be taken to increase both due process and effectiveness and this will be discussed in the final Chapter Eight.⁹³

7. Conclusion

This brief Chapter has advanced the proposition that fairness consists of three fundamental principles of due process and access and a counterpoise to reduce pre-existing inequalities. Traditionally, the notion of due process has insured that the parties are treated equally and that dispute resolution is a rational, accurate and regular process. However in the 20th century there has been more emphasis on power imbalances and the need to equalise pre-existing inequalities, as for example espoused in Rawls' difference principle. If one accepts that fairness requires due process, access and a counterpoise to pre-existing inequalities a conflict results. If due process is increased, access is likely to be reduced and a greater counterpoise is required. The Chapter has shown that there is an inherent conflict between due process, which tends to make dispute resolution less accessible and effectiveness,

⁸⁹ W Park fn 40 50

⁹⁰ See also W Park fn 40 48-50

⁹¹ 8-5 on the need for a subsidy from general taxation

⁹² 5-5 on ODR & access to justice

⁹³ 8-5, 8-6

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which requires that access to dispute resolution is increased. Therefore the challenge of any fair dispute resolution system is to find the 'right' balance between these principles. There is a wide range of methods which might be used to increase access and to reduce pre-existing inequalities; this thesis will look at one particular method: Chapter Five discusses the potential of Online Dispute Resolution (ODR) to increase access to justice and its ability to act as a counterpoise against existing procedural power imbalances. This thesis will also show in Chapters Seven and Eight that concerns exist as to whether ODR complies with due process requirements. However before these aspects of fairness are debated and weighed up it will be expedient to demonstrate why ADR and ODR is needed for internet disputes in the first place. This will be the task of the next two Chapters.

Chapter 3: Internet Disputes

If there is a technological advance without a social advance, there is, almost automatically, an increase in human misery.

(Michael Harrington (1928-1989))

1. Introduction

The purpose of this Chapter is to circumscribe the types of disputes this thesis is concerned with. It starts by conceptualising the characteristics underlying the internet and why this makes the resolution of internet disputes difficult. The Chapter discusses the nature of the internet as a powerful multi-media communications channel, which has enabled individuals and consumers to take part in international interactions, cross-border e-commerce and international publishing on an unprecedented scale. By way of illustration, this Chapter sketches some typical international disputes, which arise (or hypothetically may arise) on the internet as a cross-border communications medium. This leads to a concern about cross-border disputes involving individuals and their access to cross-border litigation and power imbalances, where one party has much more resources for disputing than the other.

2. Characteristics of the Internet

By way of overview, this Section very briefly outlines the main characteristics of the internet and assesses the implications of these characteristics for internet disputes. This Section is organised under three aspects. The first aspect is that the location of the actors is irrelevant for the functionality of the internet, hence interaction is possible between any locations in the world. The second aspect is that it is difficult to map the geographical location of the actors and activities. Thirdly,

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the internet has led to an increase in cross-border contacts and interactions by individuals on a mass scale.

Before discussing the characteristics of the internet, a definition of the term 'internet' is called for. The internet essentially is a medium for communications that allows data exchanges between computers across the world. The internet consists of hardware, a set of protocols called the TCP-IP set of protocols and various software applications such as the world-wide-web, email, peer-to-peer file sharing systems, ftp and newsgroups, allowing computers (and ultimately the persons sitting behind these computers) to communicate with each other.⁹⁴ The technology of the internet interconnects networks of networks of computers world-wide. It is important to point out that the phrase 'on the internet' (just like the phrases 'on the television' or 'on the telephone') does not relate to a particular place but to a communications medium for the provision or collection of data.⁹⁵

2.1 Location irrelevant for functionality

The internet is a transnational communications medium that enables the seamless exchange of information through various applications (such as email or the world-wide-web) across national borders at a high speed.

Location is irrelevant for the functionality of applications used on the internet. In principle, information on a networked computer can be exchanged with any other networked computer, regardless of its geographical location. The reason for this is that the internet Protocol (IP) address system used to locate computers on the networks is not structured according to geographic or political borders.⁹⁶ In other words, the logic underlying the IP address system is not congruent with

⁹⁴ Sometimes, the word 'internet' is used in a loose sense to refer to the world-wide-web, but strictly speaking this is incorrect and I avoid such use of the term.

⁹⁵ See C Reed *Internet Law* (2nd edition Cambridge University Press 2004) 8-13

⁹⁶ D Johnson, D Post 'Law and Borders-the Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367-1402, 1370-1371; J Reidenberg 'Governing Networks and Rule-Making in Cyberspace' (1996) 45 *Emory Law Journal* 911-930, 913-914; H Perritt, 'The internet is Changing the Public International Legal System' (1999-2000) 88 *Kentucky Law Journal* 885-955, 886-888

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geographical borders. For this reason, the internet can be described as 'borderless' or ubiquitous and the location of computers on the network of networks is irrelevant for both receiving/accessing and providing/sending information.

David Johnson and David Post in their famous article 'Law and Borders-The Rise of Law in Cyberspace' have emphasized the borderless nature of the internet:

'Cyberspace has no territorially based boundaries, because the cost and speed of message transmission on the Net is almost entirely independent of physical location. Messages can be transmitted from one physical location to any other location without degradation, decay or substantial delay, and without any physical cues or barriers that might otherwise keep certain geographically remote places and people separate from one another (...) The system is indifferent to the physical location of those machines.'⁹⁷

Also *Christopher Marsden* writes:

'The ubiquity, rapid penetration and commonplace necessity of international data flows over digital communications networks (...) combined with the economic and social effects of such flows, makes the internet the paradigm of globalisation: it was "born global".'⁹⁸

This ubiquity of the internet is of course subject to the proviso that the infrastructure conditions, such as the fixed telephony network, affordable internet access and availability of broadband are not the same in each country. But provided there is capacity to access the network, communication is not contingent on physical proximity between sender and recipient. The internet enables communication over large distances at low cost.

⁹⁷ D Johnson, D Post fn 96 1370-1371

⁹⁸ C Marsden 'Introduction: information and communications technologies, globalisation and regulation' in C Marsden (ed.) *Regulating the Global Information Society* 1-40, 2

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The borderless nature of the internet means that more interactions and transactions are involving parties located in different jurisdictions. Therefore there is a likelihood of a greater number of small value, cross-border disputes. For such disputes it is difficult and complex to find a competent court, determine the applicable law and ensure enforcement, see the discussion below in section Nine.

2.2 Difficulty of establishing location of internet users

IP addresses, URLs and email addresses are opaque in the sense that they do not necessarily reveal the location or identity of the person operating the computer(s) thus identified on the internet.

Any particular access point on the internet is identified by an IP address. IP addresses contain four numbers, each in the range of 0-255, separated by a dot. IP addresses are not structured according to geographic locations. Therefore an IP address does not by itself disclose the geographical location of a user.

However it should be pointed out that, as a reaction to the difficulty of determining the location of internet users, technologies have been developed, which look up the likely location of the user from that user's IP address.⁹⁹ Since IP addresses have been allocated in blocks it is possible for such technologies to map most IP addresses. Some editorials have argued that they mean that borders are returning to the internet.¹⁰⁰ However this is an exaggeration- it is debatable how accurately geolocation tools can predict the location of a computer connected to the internet¹⁰¹ and they are not used for all internet interactions and transactions.

⁹⁹ Examples: <www.quova.com> and <<http://www.digitalenvoy.net/>> [14. September 2007]

¹⁰⁰ B Tedeschi 'E-commerce: Borders Returning to the internet' *New York Times* (2. April 2001); 'Putting it in its place' *The Economist* (9. August 2001)

¹⁰¹ In *LICRA and UEJF v Yahoo! Inc and Yahoo France*, Tribunal de Grande Instance de Paris, 20. November 2000 the appointed expert panel found that IP mapping is about 70% accurate (mapping the IP addresses to a particular country). For a more detailed description of geolocation tools and their limitation see ITAA 'E-commerce Taxation and the Limitations of Geolocation Tools' available from <http://www.ita.org/taxfinance/docs/geolocationpaper.pdf> [14. September 2007]

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Domain names do not reveal much about the user's location. A domain name is an alphanumeric label corresponding to an IP address.¹⁰² Domain names were introduced as they are easier to remember than a string of IP numbers. URLs (locating a resource on the world-wide-web such as <http://www.iana.org/root-whois/tm.htm>) and email addresses (such as s.cromey@qmul.ac.uk) are based on domain names. Domain names are hierarchical. The last suffix such as .edu or .uk is the top-level domain, which can either be generic (such as .edu, .com, .biz, .museum, .pro, .name, .aero, .int, .net, .org) or country-specific (so-called country-code domain names, such as .uk). However, even a country code top-level domain name does not necessarily indicate that the registrant of that name is located in that country. Some country-code top-level domain registries (such as that of Turkmenistan¹⁰³) register non-resident users for their country-code top level domain.

This difficulty of establishing a user's location means that users interact and transact without being aware of the geographical location of each other. If a dispute arises they may have to face the fact that their counterparty(ies) is (are) unexpectedly located in another jurisdiction or many locations, as the case may be.

Twinned to the question of location is the question of identity. The only trace a user leaves is anything they choose to disclose about themselves and their IP address, neither of which are, in many cases, sufficient to establish a person's identity.¹⁰⁴ The recipient of an internet communication cannot presume that the sender is the person he claims to be. Attributes of a person such as his or her name, geographical address are more difficult to assess and verify in an internet communication than in

¹⁰² W Black 'The Domain Name System' in L Edwards, C Waelde *Law & the internet* (2nd ed Hart Oxford 2000) 125-132, 125-126

¹⁰³ .tm is popular for trade mark domain names, anyone can register. see the .tm Registry website <http://www.nic.tm/> [14. September 2007]

¹⁰⁴ Some access providers allocate IP addresses dynamically so that several connections share it. If the access provider keeps a record as to which connection used which IP address at which time it is possible to trace the connection. Furthermore, several users might share one connection or several persons may have access to that same connection.

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face-to-face communication.¹⁰⁵ Some internet interactions (such as postings on discussion boards) are routinely carried out under a pseudonym. These factors mean that for many claimants in internet disputes it may be difficult to establish the defendant's identity and to trace his or her whereabouts and assets, which is clearly a pre-requisite to starting proceedings. While tracing the defendant is an important practical, preliminary aspect of dispute resolution, it is not a point directly related to the dispute resolution procedure and hence, the question of how to establish a person's identity on the internet will not be further discussed in this thesis.

2.3 Increase in transnational contacts- a quantitative and qualitative change

To some extent, international trade, shipping, aviation and 'older' communications media (telex, telephone and fax) have also crossed borders and therefore posed a challenge to dispute resolution. However, the internet multiplies and amplifies that challenge, as it allows for many more and multi-media applications. Unlike such 'older' communications media, such as telephone and fax, the internet allows for truly *multi-media* applications. Not just voice, not just text, but also images, graphics, video, audio, music and software can be transferred from any computer to any other computer on a connected network.

In the offline world, international trade and international publishing traditionally was largely confined to 'sophisticated' business or professional people. By contrast, on the internet, everyone can publish on an international scale¹⁰⁶ and consumers and small business entities, such as sole traders, can buy/sell directly from/to an individual located abroad¹⁰⁷. The internet has lowered barriers to transactions and

¹⁰⁵ A discussion of technology for online identity checks is outside the scope of this thesis.

¹⁰⁶ A Reed 'Jurisdiction and Choice of Law in a Borderless Electronic Environment' in Y Akdeniz, C Walker, D Wall (eds.) *The internet Law and Society* (Longman Harlow 2000) 79-106, 104; L Edwards 'Defamation and the internet' in L Edwards and C Waelde *Law & the internet* (2nd ed Hart Oxford 2000) 249-273, 250

¹⁰⁷ V Heiskanen 'Dispute Resolution in International Electronic Commerce' (1999) 16 *Journal of International Arbitration* 29-44, 29-30; I Lloyd *Legal Aspects of the Information Society* (Butterworths London 2000) 268

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interactions by lowering communication costs and other transaction costs (such as those associated with payment).

With respect to internet publication, *Lilian Edwards* has put it graphically

‘the internet provides a global audience at almost zero cost. No one needs a town crier or a speaker’s corner, a television studio or a radio mike, when they have access to the net; an obsolete PC or street cybercafé will do.’¹⁰⁸

Moreover, the arrival of the internet and in particular the world-wide-web is changing the distribution and communication patterns of trade. In the pre-internet age, consumers mostly bought from retail suppliers located in their own country, and cross-border transactions were largely confined to organised B2B distribution.

Now, consumers can easily buy goods and services directly from a vast network of foreign suppliers on the web. Likewise, a small business may procure its input requirements through a B2B exchange from a small or large player located on the other side of the planet.

For business on the internet, the cost of setting up an international business, which previously has required the establishment of branches and agencies in different countries, are almost the same as for a purely local one. This is even more so if the internet business sells digitalised products (*ie* information products downloaded via the web) and uses automated decision making and processing.¹⁰⁹ Therefore, these low barriers of entry and access have enabled even very small businesses to offer their goods and services on a global scale to small and large players alike. In addition, auction platforms such as Ebay enable consumers (and small businesses) to sell internationally on a large scale. Social networking sites such as *Facebook* or

¹⁰⁸ L Edwards fn 106 249

¹⁰⁹ C Reed fn 95 5

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MySpace and game providers such as *Second Life* also enable transnational interactions between individuals.

Thus it seems fair to state that the internet has intensified international contacts and transactions at and between all levels. This entails a greater number of cross-border disputes involving small businesses, consumers and other non-professional, 'unsophisticated' parties. Therefore the internet gives rise to many disputes with a significant power imbalance between the parties.

2.4 Conclusion: the implications for internet disputes

The characteristics of the internet which inform this discussion are its borderless, ubiquitous nature, the difficulty to establish a user's location and the fact that it allows direct, multi-media communications and transactions between individuals on a global basis. It follows from these characteristics that the internet is causing an increase in cross-border disputes, a number of which will be of small value and/or involve a significant power imbalance between the parties. In other words, there are three features which cause issues for dispute resolution: (i) parties located in two different jurisdictions, (ii) small value of the dispute and (iii) power imbalances, especially if in many internet disputes these factors are combined.

Figure 3 illustrates the characteristics of the internet and their implications for disputes. Cross-border disputes are difficult to solve because of the jurisdictional challenges, explained in section Nine. Small value disputes are difficult to solve, as the cost of dispute resolution may be disproportionate to the value of the dispute, causing problems for access to dispute resolution for individuals. However, these first two issues, cross-border nature and small value can, at least partially, be addressed by the use of ODR and this will be discussed in Chapter Five.¹¹⁰ The third concern, effectiveness, is even more difficult to address. Power imbalances are a matter of concern as they infringe the equality principle the significance of which

¹¹⁰ 5-5

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has been discussed in Chapter Two.¹¹¹ It is the function of the following sections of this Chapter to describe and illustrate the types of cross-border internet disputes which give rise to significant power imbalances.

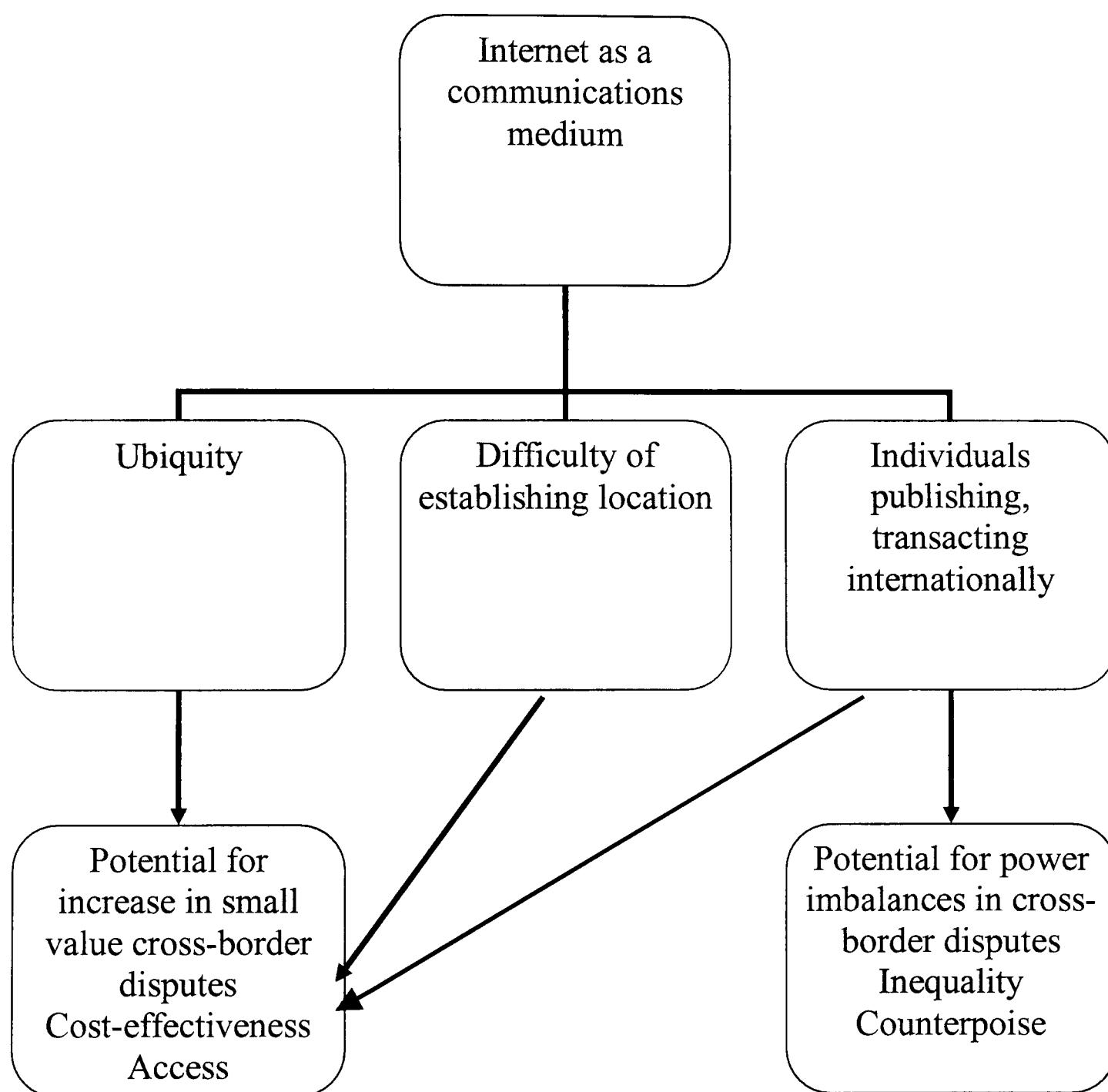


Figure 3: Characteristics of the internet and implications for internet disputes

¹¹¹ 2-2 and 2-5

3. Examples of Internet Disputes

In this thesis internet disputes are disputes connected to the use of the internet in a *wide sense*. This includes *all* disputes arising from the parties communicating, interacting or transacting through the internet as well as disputes about the technology itself (such as disputes about the registration of domain names). Thus the phrase ‘internet disputes’ encompasses all types of private disputes based on actionable rights and entitlements.

For the purposes of this thesis, e-commerce disputes are a sub-category of internet disputes, *ie* disputes of a commercial nature, which are based on a contractual relationship between the parties. Depending on the nature of the parties to the dispute, a further distinction can be made between business to business (B2B), business to consumer (B2C) and consumer to consumer (C2C) e-commerce disputes.

Clearly the phrase ‘internet disputes’ is indeterminate. An endless variety of disputes occur on the internet or about the internet. Since this thesis is concerned about the fairness of dispute resolution, the task is to describe and illustrate the types of ‘internet disputes’ giving rise to concerns about fairness. As has been outlined in the preceding section, these are particularly those internet disputes the parties to which are of significantly unequal power, if the parties are located in two different jurisdictions. Hence this thesis ignores internet disputes, where the disputants are fairly sophisticated business parties, even if both parties are in different jurisdictions, as such disputes can be and are in practice resolved by traditional litigation or arbitration. This section briefly illustrates examples of the disputes this thesis is most concerned about.



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Example One

A sole trader in Nigeria concludes a contract with a company, manufacturing locally in China and trading internationally, for some widgets through a B2B e-commerce trading platform. The widgets are defective and the sole trader seeks redress for breach of contract.

Example Two

A consumer in Chile enters into a contract with a large US travel company for a cruise holiday through an e-commerce website. However the cruise is cancelled at the last minute and the deposit of \$ 2000 has not been refunded. The consumer seeks return of the deposit paid.

Example Three

The owner of a bricks and mortar shop located in Dublin has named her shop 'Crate & Barrel' and she also operates a website connected to her shop under the domain www.crateandbarrel.biz. A large US company running an extensive chain of stores present in most states of the US claims infringement of their US Federal trade mark in the same name and commences infringement proceedings against the unincorporated Irish trader before a US District Court. The owner cannot afford litigation in the US and the US District Court enters default judgment in favour of the US corporation. The domain name is transferred to the US corporation.¹¹²

Example Four

A US-based corporation publishes an online article on an interactive online news platform, accusing a named Egyptian civil servant of belonging to a terrorist organisation. The Egyptian individual seeks redress for defamation.

¹¹² See *Euromarket Designs Inc v Crate & Barrel Ltd and Peters* 96 F Supp 2d 824

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Example Five

A US citizen uploads potentially defamatory comments about an internationally famous Australian film star on his own website. These comments are copied and downloaded widely and thus propagated on a global basis. The film star commences proceedings against the US citizen before his local Australian court for defamation.

Example Six

A large Russian company illegally hacks into the server of an English inventor in order to obtain confidential, sensitive information. The English inventor seeks redress for damages arising from this unlawful action.

Chapter Eight¹¹³ will return to these examples and consider if and to what extent the Model of dispute resolution developed in this thesis can provide for a fair resolution of such disputes.

All six examples of internet disputes involve parties in two different jurisdictions whose contact is enabled and intermediated by the internet. It is unlikely that these parties would have come into conflict in the offline, pre-internet world. All six examples pitch an individual against a large incorporated organisation, either as claimant or defendant. These examples illustrate the cross-border nature of some internet disputes coupled with a power imbalance between the parties. The examples mentioned are not limited to contractual disputes, but include tortious and other disputes.

This raises the question whether this thesis covers disputes between individuals (such as, but not limited to, a C2C dispute). These disputes are less problematic

¹¹³ 8-2.1.3 (c)

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from the point of view of fairness¹¹⁴ as it is less likely that there is a significant power imbalance between the parties¹¹⁵. The lack of a power imbalance makes it more likely that the parties can successfully use ADR/ODR to solve their dispute. However even if there is no pre-existing power imbalance between the parties, in small claims, cross-border internet disputes, the parties will have no access to the courts. This means that the parties have no effective access to the courts.¹¹⁶ Since ADR/ODR operates in the ‘shadow of the law’¹¹⁷, this will impact on the effectiveness and fairness of extra-judicial dispute resolution. Therefore, such internet disputes between individuals are covered by the thesis and the Model outlined in Chapter Eight¹¹⁸ will include them.

4. Contract and Tort

Only courts have are co-ercive without an agreement of the parties. Extra-judicial means of dispute resolution require an agreement between the parties to participate.¹¹⁹ This agreement can be concluded before or after the dispute has arisen. Parties to a contract may well incorporate a clause about dispute resolution in their contract and thereby bind themselves to participate in dispute resolution long before a dispute arises. By contrast, parties to a tort dispute frequently have had no previous relationship or contact with each other, which raises the question of how these parties can agree to extra-judicial dispute resolution. In some instances the parties may agree to use such dispute resolution after the dispute has arisen, but in other instances this is unlikely. If the weaker party is a claimant who cannot afford litigation, it is unlikely that the stronger defendant agrees to use other forms of settlement, as in Examples Four and Six. By not agreeing to use alternative forms of dispute resolution, the defendant can stall the claimant’s attempts to obtain redress.

¹¹⁴ Chapter 2

¹¹⁵ 3-5

¹¹⁶ 2-2.3.1

¹¹⁷ 4-3.1

¹¹⁸ 8-6

¹¹⁹ 4-3

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However, there might be models other than a bilateral agreement to bind a defendant to extrajudicial dispute resolution. For example if the unlawful act is committed using technology controlled by a third party intermediary, such as a platform provider, this third party may bind the users of that technology to take part in extra-judicial dispute resolution.¹²⁰ Therefore, the use of extra-judicial dispute resolution is not limited to contractual disputes.

5. Power in Dispute Resolution

A power imbalance essentially arises if one party has significantly more power than the other. This raises the question of what gives power in dispute resolution.

Power manifests itself in different forms and power relationships are frequently complex. Power itself is affected by the perception the parties have of their own power and that of the other party.¹²¹

This Section considers the meaning of power in dispute resolution and negotiation of legal relationships, suggesting that three main factors can be distinguished: resources, whether a party is a repeat player and vulnerability.

5.1 Resources

One obvious factor is a party's resources to fight a case or negotiate a contract. By way of illustration, this encompasses financial resources, human resources, legal know how, access to internal or external legal advice (in particular on foreign law) and the ability to engage top lawyers in the relevant jurisdiction(s).¹²²

¹²⁰ 8-2.1.3 (b)

¹²¹ H Brown, A Marriott *ADR Principles and Practice* (Sweet & Maxwell London 1999) 479

¹²² H Brown, A Marriott fn 121 479, L Nader & C Shugart fn 49 64-65

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5.2 Repeat player effect and power

Marc Galanter has coined the terms ‘repeat player’ for parties, who have been regularly involved in similar types of disputes. This can be contrasted with the ‘one shotters’, for whom the dispute at issue is the only dispute of that kind they have ever been involved with.¹²³ The repeat players are at a substantial advantage for several reasons¹²⁴:

- (i) They have acquired legal knowledge and access to specialist lawyers through their previous involvement;
- (ii) They have knowledge and experience of the relevant dispute resolution processes and institutions;
- (iii) They benefit from economies of scale in their dispute resolution practice;
- (iv) They can engage in strategic behaviour by settling some cases but not others, thereby creating precedent favourable to them;
- (v) They can engage in lobbying activities to change the law in their favour;
- (vi) They have informal continuing relationships with the relevant institutions and have established a client relationship with such institutions.

For these reasons, repeat players have strategic advantages and more power in their disputes with one-shotters.¹²⁵ *Lisa Bingham* in her empirical study of 1998 comparing the statistics of non-repeat and repeat appointments of arbitrators by employers has clearly shown that employers are at an advantage over employees where they make repeat appointments.¹²⁶

This raises the question of who are the typical repeat players in internet disputes. In the examples mentioned above, it seems that the ‘bigger’ party is also likely to be a

¹²³ M Galanter ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law and Society Review* 95-160, 97

¹²⁴ M Galanter fn 123 98-103; L Bingham fn 62, 240-244

¹²⁵ Also 6-6.1.1

¹²⁶ L Bingham fn 62 236-239; see also AS Rau ‘Integrity in Private Judging’ (1997) 38 *South Texas Law Review* 485-539, 524

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repeat player, in the sense that they are more frequently involved in similar disputes. In Examples 1 and 2, the large manufacturer of widgets or a large travel company is more likely to have encountered similar complaints by other sole traders or consumers. Large and sophisticated owners of IP, such as a trade mark registration (Example 3), are likely to defend their rights on a regular basis and have strategies in place for doing so. Finally, large publishers of news are periodically sued for defamation and will likewise have strategies in place for defending themselves against such suits (Example 4).¹²⁷ If one party pays for dispute resolution and regularly makes appointments the arbitrator or mediator, this also causes a 'repeat player' effect.¹²⁸

5.3 Vulnerability

The relative importance of the case for each party is another factor.

One party may only be marginally concerned by the result of the dispute resolution or contract negotiation, whereas the other may be crippled by an adverse resolution or the failure to reach an agreement.¹²⁹ In other words the parties may have very different stakes: for one party the outcome is critical, for the other the stake (and risk) is small. If this is the situation the party for whom the outcome is critical is more vulnerable and has therefore less power.

On the other hand, one party may be more vulnerable than the other for the reason of exactly the opposite problem: the stake is so small that it is inefficient to invest much resources, with the consequence that the other party is not held liable for its breach or infringement. This is the case in many consumer claims, where individual consumers may not bother to pursue a claim, as the stake is too small.

¹²⁷ However this does not mean that the more powerful player (in terms of size and resources) is always the repeat player; one could think about an individual who is a serial cybersquatter registering the domain names of various large entities and hence gets involved in various pieces of litigation or other domain name dispute resolution.

¹²⁸ R Reuben 'Constitutional Gravity: a Unitary Theory of Alternative Dispute Resolution and Public Civil Justice' (2000) 47 *UCLA Law Review* 949-1104. 1063-1066

¹²⁹ H Brown, A Marriott fn 121 479

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Vulnerability can be a complex factor and can include emotional aspects, such as one party's desire to seek justice or revenge, which are impossible to quantify and which play a role in disputes regardless of the status of the parties.

Therefore, vulnerability is difficult to assess. Furthermore, vulnerability as a factor can only be assessed on a case-by-case basis. However general assumptions based on the preponderance of power in certain relationships have to be made, if a workable definition for power imbalances is to be found. Generally speaking, a party with less resources and who is a single shot player is likely to be more vulnerable for the reason that he or she has more at stake. For this reason it is suggested here that these two factors, financial resources and repeat player status, are more reliable (if perhaps stereotypical) than an assessment of the vulnerability of a party.

6. Definition of Relevant Disputes in Respect of the Parties

It is one thing to identify 'a problem' with power imbalances and to describe some situations in which a power imbalance exists and quite another to define conclusively when the Model of dispute resolution, which this thesis identifies, should apply. As has already been pointed out in Chapter Two¹³⁰ this thesis suggests that the presence of power imbalances cannot be assessed on a case-by-case basis. Therefore it is necessary to develop general categories, linked to the status of the disputants which are presumptive of the presence of a power imbalance.

The closest existing legal paradigm to the issues examined here is that of consumer protection laws. If one party satisfies the legal definition of the status 'consumer' and the other party satisfies the legal definition of the status 'business', there is a legal presumption that a power imbalance exists and hence consumer protection law

¹³⁰ 2-5

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applies as a mandatory form of law. As a consequence, special rules protecting consumers apply in certain defined business to consumer relationships. In this section the definition of ‘consumer’ under different laws will be examined and it will be argued that this definition needs widening for the purposes of this thesis on internet dispute resolution.

6.1 Meaning of ‘Consumer’ under different laws and regulations

The definition of what amounts to a business to consumer relationship varies between different pieces of legislation in a piecemeal fashion. Summarizing the thrust of these different pieces of legislation, essentially two components¹³¹ can be distinguished:

(i) Generally speaking, the consumer must be an individual who does not act in a business capacity.¹³² Some legislation, however, includes unincorporated business entities (such as a sole trader or a partnership) in the definition of a consumer¹³³ and there is caselaw¹³⁴ suggesting that even a company can act as a consumer under the Unfair Contract Terms Act 1977.¹³⁵

¹³¹ Some legislation in addition requires that the goods or services supplied must be intended for private, non-business use, s.12 (1) (c) Unfair Contract Terms Act 1977, not if the consumer is an individual, s.12 (1A)

¹³² S.12 (1) (a) Unfair Contract Terms Act 1977; Art.2 (b) Directive 93/13/EEC on Unfair Terms in Consumer Contracts; Art.2 (e) E-commerce Directive 2000/31/EC; Art.2 (2) Distance Selling Directive 1997/7/EC and Art.15 (1) Jurisdiction Regulation EC/44/2001

¹³³ Example: s. 189 Consumer Credit Act 1974: the term ‘individual’ includes an unincorporated body, such as a partnership

¹³⁴ *R&B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321 (CA) 330

¹³⁵ Clear from s.12 (1) (a) Unfair Contract Terms Act 1977, but if the party is not an individual, then according to s.12 (1) (c) the goods must be of a type ordinarily supplied for private use and consumption. An example of this would be a company buying drinks or a car for their employees’ private use. By contrast, European legislation makes clear that a consumer must be a *natural* person acting for purposes which are outside his trade, business or profession, see Art.2 (b) of Directive 93/13/EEC on Unfair Terms in Consumer Contracts; Art.2 (e) E-commerce Directive 2000/31/EC; Art.2 (2) Distance Selling Directive 1997/7/EC, Art.15 (1) Jurisdiction Regulation EC/44/2001 only refers to ‘persons’, not *natural* persons, however the ECJ has made clear that only natural persons are protected by the consumer provisions in the Jurisdiction Regulation, see Case C-150/77 *Bertrand v Ott* [1978] 1431(ECJ) Para 22 and also Case C-269/95 *Benincasa v Dentalkit* [1997] ECR I 3767 (ECJ) para.17. Similarly the ECJ has also found that the notion of ‘consumers’ does not extend to legal persons in the context of Directive 93/13/EC. Joined Cases C-451 and 451/99 *Cape SNC v Idealservice SRL* [2003] 1 CMLR 42 (ECJ) para. R1. The tendency is that under EU legislation the notion of consumers has a narrower meaning, see for example the case of C-

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(ii) Conversely, the supplier must act in a business capacity.¹³⁶ It seems that for the purposes of civil liability this criterion is interpreted widely. There is no need that the transaction is an integral part of the business, in the sense that the business trades in the type of goods or services sold. Hence a fisherman selling his boat was acting in the course of business.¹³⁷ Generally speaking, there are no limitations on the size of the entity of the supplier and the definition of the business party includes natural persons (such as sole traders and traditional partnerships) as well as incorporated entities such as companies.

The traditional B2C paradigm just described can be criticised on three grounds.

First, it is problematic to subject all businesses, regardless of their size and operation to the same types of consumer protection rules. However, this criticism is probably slightly less important in the context of fairness of dispute resolution mechanisms, and more important in the context of a discussion on substantive consumer protection laws.¹³⁸

The second criticism is that the criteria are sometimes inaccurate in assessing power imbalances. An example of this would be a hypothetical case of an extremely wealthy and sophisticated consumer who contracts with a sole trader. In *Standard Bank of London Ltd v Apostolakis* two high net worth individuals (husband and wife) entered into an investment contract to acquire foreign currency worth US \$ 7 million and the court found that they acted as consumers.¹³⁹ The problem this

464/01 Johann Gruber v Bay Wa AG OJ C57/1 of 5. March 2005. In that case, the ECJ found that in the context of the Brussels Convention, where the contract is for goods partly intended for private and partly for trade purposes, the consumer provisions only apply if the trade purpose is so limited as to be negligible. Contrast this with the case of *R&B Customs Brokers Co Ltd v United Dominions Trust Ltd* fn 134 330 in which the court said that in the case of mixed use, the business use only prevails if there is a high degree of regularity of the business use.

¹³⁶ For example, s.12 (1) (b) Unfair Contract Terms Act 1977

¹³⁷ *Stevenson v Rogers* [1999] 2 WLR 1064 (CA) 1039-1042

¹³⁸ The only significant burden imposed on businesses in the Model proposed in Chapter 8-6 is that the 'stronger' party should pay a greater share of the costs of dispute resolution.

¹³⁹ [2000] ILPr 766 (Comm) 772

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illustrates is the general proposition that it is impossible to find general criteria for assessing power relationships which fit all individual cases. While even a small business party on superficial consideration may be more powerful than an individual of very modest means, this power imbalance may shift if the individual obtains general legal aid. Likewise, while a multi-national corporation seems more powerful than a consumer in terms of vulnerability, this power imbalance may be reversed in some, possibly rare cases, if the multi-national corporation is very sensitive to publicity. However legal criteria have to rely on generalized assumptions, without which it would be impossible to formulate policy principles.

The third and most important criticism is however that the scope of the traditional consumer paradigm should be widened for this discussion of fairness in the resolution of internet disputes. The traditional paradigm would only apply to Example Two above and would ignore all other power imbalances.

It is interesting to note that in two recent ombudsman dispute resolution schemes the class of eligible complainants has been widened to include not only individual consumers, but also small businesses. In the Ombudsman scheme for the resolution of disputes between communication service providers and their customers set up by the Communications Act 2003, small business customers, defined as those with no more than 10 employees, can also file a complaint under the scheme.¹⁴⁰ In the Financial Ombudsman Service scheme, as far as it relates to financial services, an eligible complainant includes a business which has a group annual turnover of less than a million and a charity which has an annual income of less than a million and a trust which has a net asset value of less than a million.¹⁴¹ Furthermore it is stated expressly that a complainant can be a sole trader, company or partnership.¹⁴²

¹⁴⁰ S. 52 (6) (b) Communications Act 2003- scheme briefly discussed in Chapter 8

¹⁴¹ Financial Services Handbook, Rule 2.4.3

¹⁴² Financial Services Handbook, Rule 2.4.4

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The Chartered Institute of Arbitrators has also set up a special arbitration procedure for disputes between a company and a small business¹⁴³ or individual consumer.¹⁴⁴ These examples also indicate that the paradigm has to be widened.

By contrast, for complaints relating to consumer credit, which are heard by the Financial Ombudsman Service since April 2007, the definition of eligible complainant is narrower: only unincorporated entities and only partnerships with up to three partners can use this service.¹⁴⁵ This is similar to the definition put forward in the next section.

6.2 A preliminary definition: widening the scope

The main conclusion from the discussion of the B2C paradigm is that it is unsuitable for this discussion of fairness in the resolution of internet disputes. It is too narrow to deal with power imbalances in the resolution of internet disputes. For the Model proposed in this thesis the scope here should be wider and encompass both contract and tort disputes. Moreover the subject-matter of internet disputes is wider, not merely including disputes about commoditised, consumer goods and services, but includes a whole variety of other issues. Hence the traditional B2C paradigm does not fit well.

For the purposes of the argument of this thesis, the definition of power imbalances in internet disputes should be restricted to disputes where one party is an individual¹⁴⁶ and the other party is a corporate entity.¹⁴⁷ For this it is irrelevant

¹⁴³ Defined as a business with no more than 10 employees

¹⁴⁴ Independent Consumer Arbitration Service (ICAS), Rule 1.1, rules available from http://www.idrs.ltd.uk/Consumer/PDF/ICAS_Rules_Application.pdf [14. September 2007]

¹⁴⁵ Financial Services Handbook Rule 2.4.3

¹⁴⁶ A natural person

¹⁴⁷ A legal person, see the discussion about the Financial Ombudsman Service above. In the Proposal for a EU Regulation establishing a European Small Claims Procedure a similar pattern of power imbalance is also assumed, see for example Art.14 (2) on Costs which provides that a *natural* person who is not represented by a lawyer is not obliged to pay the costs of the other party, if that party is represented. See the Proposal of 15. March 2005, COM(2005) 87 final- the Explanatory Memorandum expressly states that the

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whether or not the individual acts for private, non-profit purposes or acts in the course of a trade, business or profession. The criterion for the ‘stronger’ party should be that this party is incorporated, *ie* a legal person. The assumption made here is that entities above a certain size and sophistication are likely to be incorporated. Arguably this definition should also include incorporated partnerships. Unincorporated partnerships should be treated as natural persons.

This definition of relevant power imbalances is admittedly crude, but it has the beauty of clarity and simplicity. It would not catch power imbalances between individuals and between incorporated entities. The assumption here is that power imbalances between such entities are, relatively speaking, less severe than those between individuals and corporations. The definition would falsely catch disputes if, for example, a company and an individual are of equal power in dispute resolution, which it is assumed to be comparatively rare.

An alternative approach would be to define the business entity by setting threshold values relating to its power (for example market capitalisation of a company, turnover, size of employees, number of offices) but it is submitted here that this is likely to be complicated, unclear and equally inaccurate.

Thus redefined, the definition would capture the power imbalances in Examples One, Two, Three, Four and Six. It would not apply to Example Five, involving a dispute between two individuals, but this result is probably correct, as it would be impossible to encapsulate the respective ‘power’ of individuals by legal rules.

6.3 The definition of relevant internet disputes and its purpose

The definition of relevant internet disputes for the purposes of the argument in this thesis is as follows: disputes directly resulting from one party’s activities or both

Proposal is not limited to consumers, as owners of small businesses equally face difficulties when pursuing claims in other Member States, see p. 3.

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parties' interaction on the internet, if at least one party is an individual.¹⁴⁸ The main concern of this thesis are such disputes between a corporate entity and an individual because of the presumed power imbalance.

As has already been pointed out in the previous Chapter Two¹⁴⁹, this thesis is only concerned with fair dispute resolution, not with power imbalances generally. Hence the purpose of the definition of relevant internet disputes is not to define or re-define the scope of substantive laws protecting the weaker party, nor to discuss such laws as such. The argument presented here is not about widening the law on consumer protection, but merely to discuss a model incorporating fair procedural rules for the resolution of internet disputes.

However, it should be pointed out that there is no clear dividing line between substantive and procedural issue. One area of overlap is the area of applicable law and in particular the question of in which situations mandatory laws, protecting the weaker party in the situation of a power imbalance should apply. This discussion is within the scope of the thesis and will take place in Chapter Four¹⁵⁰.

Furthermore where both parties are individuals there may not be a power imbalance (as just defined). However if the claim is small, the parties may not be able to litigate (as discussed in section 9). Hence there is lack of access (second principle of fairness as discussed in Chapter Two¹⁵¹) and therefore such disputes are included in the Model discussed in Chapter Eight¹⁵².

Therefore the Model in the thesis applies to cross-border internet disputes, where the value of the claim is small and the parties are either both individuals or an individual pitched against a corporate entity.

¹⁴⁸ This includes, but is not limited to B2C disputes.

¹⁴⁹ 2-5

¹⁵⁰ 2-4.5

¹⁵¹ 2-2.3.1

¹⁵² 8-6

7. Definition of Relevant Disputes in Respect of the Size of the Claim

The main issue in this thesis is the fact that the parties to an internet dispute are likely to be located far from each other, possibly in different jurisdictions. This factor increases the cost and complexity of internet dispute resolution. It has its greatest impact on small disputes, as here the costs of resolution may easily be disproportionate to the value of the claim.¹⁵³ Hence the distinction made between small and large disputes.

As has been mentioned in Chapter One, this distinction refers to the value of the *claim* in dispute. A small claims dispute involves a claim in a cross-border internet dispute where the costs of litigation and enforcement across a border make it disproportionately expensive to do so. This raises the question of what falls in the category of small disputes. In the UK the domestic small claims track, triggering a less formal court procedure, is £5000¹⁵⁴. Since cross-border disputes are more expensive to litigate and to enforce, it is likely that the figure as to what amounts to a 'small' international dispute is considerably higher.¹⁵⁵ Under the proposed European Small Claims Procedure the value of small claims is even smaller, *ie* Euro 2000¹⁵⁶. These limits give some guidance as to the relevant values in litigation. The Model developed in Chapter Eight will distinguish between and adopt different solutions for, small disputes on the one hand and large disputes on the other hand.

¹⁵³ A study commissioned in 1995 by the European Commission found that on average the total costs of realising a cross-border claim by litigation in the EU was Euro 2489 (about £1673) (proceedings at the defendant's residence), see H von Freyhold, V Gessner, E Vial and H Wagner (Eds) *Cost of Judicial Barriers for Consumers in the Single Market, A Report for the European Commission*, Zentrum für Europäische Rechtspolitik an der Universität Bremen, October/November 2005, Table p. 123. Since this Study is more than ten years old it is likely that this figure has risen in the meantime. For disputes involving a country outside the EU this figure will be substantially more.

¹⁵⁴ Civil Procedure Rules, Rule 27.1 (2)

¹⁵⁵ In the *Euromarket* case the English judge mentioned that the parties had already incurred more than £100,000 in costs up until the preliminary hearing on jurisdiction *Euromarket fn Designs Inc v Peters and Crate & Barrel Ltd* [2001] FSR 20 (ChD) para 8

¹⁵⁶ About £1344, see Art.1 (1). Proposal for a Regulation establishing a European Small Claims Procedure, dated 15. March 2005, COM(2005) 87 final

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At that point, it will also outline and develop value limits *specific* to online arbitration.¹⁵⁷

8. Charge Backs and Refunds by Payment Service Providers

This thesis will demonstrate the need for online arbitration for certain internet disputes. It has already been argued in this Chapter that the internet as a communications medium has amplified the number of disputes in which the parties are located in two (or more) different jurisdictions and involving an individual and a corporate entity.¹⁵⁸ The argument is that for internet disputes out-of-court, ADR mechanisms are crucial. This argument will be further refined in Chapters Five and Six explaining that online arbitration can provide a suitable, binding form of dispute resolution for some disputes.

However, it should be pointed out at the outset that a subset of internet disputes, *ie* consumer e-commerce disputes involving certain forms of payment mechanism, may, in some circumstances, be resolved by intervention of the payment service provider. Charge backs and refunds by payment service providers are free to the individual user and may provide redress to *consumers*¹⁵⁹. Hence, this section briefly describes these mechanisms and points out that, where such mechanisms are available and effective, online arbitration may not be necessary. But these mechanisms do not incorporate due process as outlined in Chapter Six and are hence not a complete solution for all e-commerce disputes.

8.1 Credit card charge back and joint liability

The first of these interventions by payment providers is the mechanism of charge backs by credit card issuers, which are partly backed up by legislation in the UK providing for statutory joint liability and by EU and UK legislation dealing with

¹⁵⁷ 8-5

¹⁵⁸ 3-2.4

¹⁵⁹ Not to all individuals in internet disputes, though!

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fraudulent transactions. Credit cards are currently the most common form of payment for B2C e-commerce transactions.¹⁶⁰

8.1.1 Credit charge back explained

A credit card charge back is essentially a reversal of a payment instruction moving from the credit card holder, to the credit card issuer and down the chain to the merchant bank and the merchant, re-crediting the holder's credit card account and cancelling a credit on the merchant's account.

There may be many reasons for a credit card charge back, such as processing errors, authorization issues or duplication, but in the context of this thesis customer disputes and fraud are the only two reasons of interest.

A charge back mechanism essentially allows an individual *after* having authorized payment for goods or services via a credit card to reverse payment, if the trader is in breach of contract (such as non-delivery of goods or goods being defective or not as described) or if the payment has been made fraudulently. Credit card charge back is based on and established by the Rules of the major credit card networks, such as Visa¹⁶¹ and Mastercard¹⁶².

8.1.2 UK joint liability for breach of contract and misrepresentation

In the UK, legislation goes much further in relation to credit cards issued by domestic providers. It provides not only for charge back of the purchase price to the consumer, but in the case of the supplier's breach of contract or misrepresentation

¹⁶⁰ OECD 2006 Report 'Online Payment Systems for E-commerce' (18. April 2006) available from <http://www.oecd.org/dataoecd/37/19/36736056.pdf> [14. September 2007]

¹⁶¹ See Visa, Rules for Visa Merchants, Card Acceptance and Chargeback, Management Guidelines 2006 Edition VRM 08.12.06, s.6 pp. 69 et sequi available from http://merchants.visa.com/ds/pdfs/Card_Acceptance_and_Chargeback_Guidelines.pdf [14. September 2007]

¹⁶² Mastercard Merchant Rules, Chapter 3. Chargeback Guide available from http://www.mastercard.com/us/wcc/PDF/MERC-Entire_Manual.pdf [14. September 2007]

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gives the consumer a right to pursue the credit card issuer for damages or any other remedy available. Such damages may vastly exceed the amount of the purchase price paid. Section 75 (1) of the Consumer Credit Act 1974 provides that the credit card issuer is jointly liable with the seller for breaches of contract and misrepresentation, provided that the cash price for the goods or services is in the range of £100-£30,000¹⁶³.

In a landmark ruling, the Court of Appeal has recently clarified the jurisdictional scope of these provisions: they also apply in respect of consumers entering into internet (and other) transactions with foreign suppliers, irrespective of the place where the transaction was entered into and irrespective of the location of the supplier.¹⁶⁴ The Court of Appeal held that section 75 (1) applied to *all* supply transactions where the consumer uses a credit card regulated by the Consumer Credit Act 1974, even if the supply transaction was concluded abroad or with a foreign supplier.¹⁶⁵ The main issue in the case was whether section 75 (2), which confers a right of indemnity on the creditor to recoup the loss suffered in satisfying the liability and the costs of defending the action brought by the consumer, would lead to extra-territorial application of the Act in cases where the supplier is located abroad.¹⁶⁶ The Court of Appeal rejected this reasoning on the basis that the primary purpose of section 75 was to provide additional protection to consumer debtors under domestic credit agreements¹⁶⁷ and that the creditors' right under section 75 (2) to recover against the supplier was merely ancillary to that primary object.¹⁶⁸ Furthermore the Court of Appeal found that there was nothing in section 75 that justified a distinction to be drawn between domestic and foreign supply transactions.¹⁶⁹ Finally the Court of Appeal also rejected the argument that the practical difficulties which a creditor may face in enforcing a claim against a foreign supplier are insurmountable. The Court of Appeal found that these problems

¹⁶³ S. 75 (3) (b) Consumer Credit Act 1974

¹⁶⁴ *Office of Fair Trading v Lloyds TSB* [2007] QB 1 (CA) 29, 40

¹⁶⁵ Para 122

¹⁶⁶ Para 77 et sequi

¹⁶⁷ Paras 76, 120

¹⁶⁸ Paras 88, 120

¹⁶⁹ Para 120

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are not so great as to conclude that Parliament can be presumed to have intended to exclude foreign transactions from the scope of the Consumer Credit Act 1974. The Court held that the difficulties of enforcing an indemnity claim against a supplier abroad is part of the price credit card issuers have to pay for the benefits obtained by allowing such cards to be used abroad.¹⁷⁰

The Court of Appeal decision is highly significant for internet disputes based on contractual claims or misrepresentation involving consumers. If a UK consumer has paid for an e-commerce transaction by credit card and claims breach of contract or misrepresentation and merely wishes to rescind the contract, he or she can rely on s. 75 (1) of the Consumer Credit Act 1974, even if the supplier is located abroad. Section 75 (1) therefore provides statutory backing to credit charge backs against foreign suppliers. Since many if not most consumer e-commerce transactions are now paid for by credit card, this statutory backing of the mechanism entitles the consumer to fast and effective relief.

If the consumer in this situation claims damages (over and above the purchase price) he is entitled to sue the UK based credit card issuer, obviating the need to sue the foreign supplier and/or enforce a judgment abroad. In this case s. 75 (1) relieves the consumer of the burden of cross-border litigation and shifts that burden to the creditor. Nevertheless the consumer would have to litigate and online arbitration may be more cost-effective than court litigation.¹⁷¹

Furthermore section 75 (1) does not apply if the purchase price is £100 or less¹⁷². Many consumer e-commerce transactions are of very small value and will slip underneath this threshold. In these low value transaction cases, consumers have to rely on the rules of charge back established by the credit card networks discussed above.¹⁷³

¹⁷⁰ Para 87

¹⁷¹ 5-5

¹⁷² s. 75 (3) (b)

¹⁷³ 8.1.1

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8.1.3 Protection against fraudulent misuse of all payment cards

Section 83 of the Consumer Credit Act 1974 provides that a credit card holder is not liable for the fraudulent misuse of a credit card¹⁷⁴. Hence, within the confines of this provision there is a legal obligation on credit card issuers to provide a charge back mechanism in the case of fraudulent abuse¹⁷⁵. For payment cards other than credit cards used for e-commerce (and other forms of distance selling), Regulation 21 of the Consumer Protection (Distance Selling) Regulations 2000/2334 provides that the consumer should be able to reverse a payment or obtain a full refund in the case of fraudulent use of his or her payment card. Moreover Regulation 21 (3) provides that the burden of proof of showing that the use was not authorized rests with the payment card issuer.

These provisions implement legislation within the EEA Member States providing that card issuers must cancel/re-credit payments made as a result of the fraudulent use of all payment cards in connection with a distance selling transaction, including internet transactions.¹⁷⁶

8.1.4 Conclusion as to charge backs

In e-commerce transactions paid by credit card, the credit card charge back mechanism effectively shifts the power from the merchant (who usually demands pre-payment for goods and services) to the consumer (who can use the mechanism to receive back that payment). A credit card charge back may avoid a dispute between the consumer and merchant and provide the consumer with a remedy. In this scenario it obviates the need for dispute resolution from the credit card holder's

¹⁷⁴ Similar provisions for all other types of banking cards are contained in the UK Banking Code (Version March 2005), Para. 12.12. available from <http://www.bankingcode.org.uk/pdfdocs/BANKING%20CODE.pdf> [14. September 2007]

¹⁷⁵ Although it should be noted that joint liability is of course much wider

¹⁷⁶ See Art.8 Distance Selling Directive 1997/7EC. There are no harmonised EU-wide provisions on joint liability of supplier and credit card issuer

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(consumer's) point of view. However, to the extent that the credit card charge back system is abused by card holders, there is still a need for dispute resolution from the merchant's point of view. Furthermore, and crucially these charge back systems do not provide for due process in the sense of a fair hearing as described in Chapter Six.¹⁷⁷

8.2 Paypal

Other payment mechanisms may provide some form of complaints assistance or mediation. An example of this is PayPal, an e-money provider, transferring money between two account holders and whose services have gained prominence through its use by buyers and sellers on the online auction provider eBay¹⁷⁸.

PayPal essentially deals with two types of disputes: the first type is where goods have not been delivered and the second type is where goods do not match their description, *ie* false description of goods.¹⁷⁹ Its 'Buyer Protection Programme' works at three levels¹⁸⁰:

First, at the informal level, PayPal obliges buyers to file a dispute and use an online platform to negotiate with the seller a solution and in some instances, PayPal may recommend a solution to the parties (mediation).¹⁸¹

Secondly, if the dispute cannot be solved this way, PayPal allows buyers to file a formal complaint and it will investigate (for example checking the seller's tracking system in the case of non-delivery of goods) and it may order the seller to make a

¹⁷⁷ G-P Calliess 'Transnational Consumer Law: Co-Regulation of B2C E-commerce' (2007) 3 (3) *Comparative Research in Law & Political Economy* 2-54, 15

¹⁷⁸ PayPal is now owned by eBay

¹⁷⁹ PayPal Buyer Complaint Policy (Version 12. October 2006) Para 1 available from https://www.paypal.com/uk/cgi-bin/webscr?cmd=p_gen ua_policy_buyer_complaint-outside [14. September 2007]

¹⁸⁰ If the buyer has paid money into the PayPal account by credit card, the buyer may in addition avail herself/himself of a credit charge back

¹⁸¹ PayPal Buyer Complaint Policy (Version 12. October 2006) Paras 2 and 3

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refund from his or her PayPal account (if the goods have been falsely described it may order the buyer to return the goods first), provided there are sufficient funds in the seller's PayPal account to make such a refund.¹⁸² In its terms and conditions PayPal expressly provides that it retains the right to freeze any payments made into the seller's account on complaint by the buyer.¹⁸³ However, if the seller has already redeemed the payment, PayPal will not be able to order a refund.¹⁸⁴

Finally, for certain transactions, PayPal provides (limited) insurance.¹⁸⁵

It should be noted that PayPal's 'Buyer Protection Programme' is limited as it only applies to tangible goods which can be delivered in the post.¹⁸⁶ Furthermore its refund policy for goods significantly not as described only applies to eBay transactions¹⁸⁷ and its insurance policy is limited to certain eBay sellers possessing a good track record¹⁸⁸.

Within its terms of reference the PayPal Buyer Protection will provide a remedy for the buyer using PayPal. But it should also be pointed out that its reach is limited.

8.3 Conclusion

The intervention of payment providers in the form of credit charge backs and buyer protection programmes is apt to provide a remedy for consumer buyers in many e-commerce disputes, especially those of small value. Therefore such mechanisms and programmes have an extremely important role to play in e-

¹⁸² Para 6

¹⁸³ PayPal User Agreement Para 10 available from <https://www.paypal.com/uk/cgi-bin/webscr?dispatch=5885d80a13c0db1f702b5e20651bee68365c225e0a21574aa1281977a795ba3a> [14. September 2007]

¹⁸⁴ Fn 179 Para 6

¹⁸⁵ For more detail see the PayPal Buyer Protection Policy (Version 11. January 2007) available from https://www.paypal.com/uk/cgi-bin/webscr?cmd=p_gen_ua_policy_pbp-outside [14. September 2007]

¹⁸⁶ Fn 179 Para 1

¹⁸⁷ Para 1

¹⁸⁸ Fn 185 Para 3 (a)

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commerce consumer protection.¹⁸⁹ However their reach is limited. First they only apply to disputes where the remedy is the reversal of the payment. Secondly, as discussed, the application of the various schemes is limited.¹⁹⁰ They form one piece in the intricate jigsaw of dispute resolution on the internet.¹⁹¹ Finally in the context of a thesis on the fair resolution of internet disputes it also has to be pointed out that they do not provide for due process and a fair hearing. Saying that charge backs provide a remedy to buyers in e-commerce transactions in many instances is not the same as saying that they provide a fair means of dispute resolution. Hence despite the availability of a charge back to the buyer, in some instances the merchant supplier may need a means of dispute resolution in order to obtain payment or recoup the goods.

9. The Jurisdictional Challenge of the Internet

As has been discussed above¹⁹² global interactions on the internet lead to an increase in international contacts and hence ample opportunities for cross-border disputes and conflicts between various type of disputants. This creates the jurisdictional challenge for the internet.

The problems private international law creates for the internet have been discussed elsewhere in the literature¹⁹³. The consequence of these problems are that cross-

¹⁸⁹ The main focus of this thesis is much wider than consumer protection. This thesis is concerned with the fair resolution of internet disputes, not consumer redress in e-commerce. Hence payment mechanisms are not further examined here. Their role in the jigsaw of dispute resolution on the internet will be further acknowledged in Chapter 8.

¹⁹⁰ Credit charge backs apply to credit cards not debit cards; the protection under the distance selling regime discussed above only applies to fraudulent abuses, not breach of contract; the PayPal programme is limited to tangible goods, etc.

¹⁹¹ Model in 8-6

¹⁹² 3-2

¹⁹³ R Schu 'The Applicable Law to Consumer Contracts Made Over the internet: Consumer Protection Through Private International Law?' 5 *International Journal of Law and Information Technology* 192-229; M Burnstein 'A Global Network in a Compartmentalised Legal Environment' in K Boele-Woelki, C Kessedjian (eds.) *internet Which Court Decides? Which Law Applies?* (Kluwer Law International The Hague 1998) 23-34; H Perritt 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR' (2000) 15 *Ohio State Journal on Dispute Resolution* 675-703; C Reed *Internet Law* (2nd edition Cambridge University Press 2004). A Reed 'Jurisdiction and Choice of Law in a Borderless Electronic Environment' in Akdeniz, Y & Walker, C & Wall, D (eds.) *The Internet Law and Society* (Longman Harlow 2000) 79-

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border litigation and enforcement is so expensive and time-consuming that access to this form of dispute resolution is barred but for the largest claims and that for small claims the costs and delay of cross-border litigation are frequently not proportionate to the remedy eventually obtainable. Because this topic has been treated elsewhere, it is not necessary, and for lack of space also not possible, to make this argument in detail again here.¹⁹⁴

In summary, there are three reasons for the high costs and delay: (i) the complexity of jurisdictional rules stalling the finding of the appropriate forum, (ii) cross-border enforcement (where necessary) and (iii) other cross-border aspects.

9.1 The complexity of jurisdictional rules

As has been shown elsewhere¹⁹⁵, the existing rules on jurisdiction (determining the competent court) pose a significant challenge for internet disputes, as they are based on localisation factors, *ie* the localisation of an activity or the location of an actor, either of which is difficult or even impossible to determine¹⁹⁶. For internet disputes, litigation may involve multiple sets of private international law rules, even within the EU, despite some degree of regional harmonisation in the EU. For these reasons, the application of conflicting jurisdictional rules is enormously complex, unpredictable and uncertain. As has been shown in the literature¹⁹⁷, the application of the rules may have surprising or ubiquitous effects and this uncertainty enables

106, L Gillies, 'European Union: Modified Rules of Jurisdiction for Electronic Consumer Contracts' (2000) 17 *Computer Law & Security Report* 395-398; J Hornle, 'Private International Law and E-finance: the European Perspective' (2001) 8 *The EDI Law Review* 209-229, H Kronke 'Applicable Law in Torts and Contracts in Cyberspace' in K Boele-Woelki, C Kessedjian (eds.) *internet Which Court Decides? Which Law Applies?* (Kluwer Law International The Hague 1998) 65-87

¹⁹⁴ A chapter for the forthcoming 2008 edition of L Edwards, C Waelde *C Law & the internet* (3rd ed Hart Oxford 2008) deals with these problems in detail and is attached to this dissertation as Annex

¹⁹⁵ C Reed fn 95 223, 230; M Burnstein 'A Global Network in a Compartmentalised Legal Environment' in K Boele-Woelki, C Kessedjian (eds.) *internet Which Court Decides? Which Law Applies?* (Kluwer Law International The Hague 1998) 23-34, 24, 27; H Kronke 'Applicable Law in Torts and Contracts in Cyberspace' in K Boele-Woelki, C Kessedjian (eds.) *internet Which Court Decides? Which Law Applies?* (Kluwer Law International The Hague 1998) 65-87, 65, 85; H Perritt 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR' (2000) 15 *Ohio State Journal on Dispute Resolution* 675-703, 675-676

¹⁹⁶ 3-2; also H Perritt 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR' (2000) 15 *Ohio State Journal on Dispute Resolution* 675-703, 675-676

¹⁹⁷ Fn 195

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the parties to engage in strategic behaviour ('forum shopping') entailing proceedings to determine jurisdiction and these by itself add significantly to the final legal bill and lead to further delay.

9.2 Cross-border enforcement

It has been discussed in the literature¹⁹⁸ that if a judgment must be enforced across a border, enforcement also involves some procedure entailing costs and delay and differences between national approaches means that successful claimants have no right to have foreign judgments enforced against defendants' assets, introducing an element of unpredictability. On an international level, absent any harmonisation of jurisdictional rules and an agreement of reciprocal enforcement, courts at the place where a defendant has assets may refuse to enforce a judgment. By contrast to litigation, arbitration awards are more easily enforced, as a consequence of the New York Convention.¹⁹⁹ On a regional level in the EU this may be less of a problem, as for civil and commercial matters, recognition and enforcement of a judgment is guaranteed. However even within the EU, enforcement entails a separate procedure and this entails additional costs and delay.

9.3 Other cross-border aspects

More generally²⁰⁰ cross-border litigation imposes higher costs and delay for the parties, because of the need to instruct a foreign lawyer (frequently in addition to a local lawyer), because of travelling costs of the parties and witnesses, translation costs and because enforcement is more expensive.

¹⁹⁸ P Schlosser 'Jurisdiction and International Judicial and Administrative Co-operation' (2000) 284 *Recueil des Cours* 9-430, 237

¹⁹⁹ See 6-2.6 and 6-7

²⁰⁰ P Schlosser 'Jurisdiction and International Judicial and Administrative Co-operation' (2000) 284 *Recueil des Cours* 9-430, 215-216

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9.4 Conclusion

These factors mean for claimants that legal redress is practically unattainable and effectively, that access to justice is barred in small claim cross-border internet disputes.²⁰¹ For defendants, the 'jurisdictional challenge' in internet disputes means that they may be sued in a distant foreign court or even multiple foreign courts²⁰² and that such a dispute may be impossible to defend, again because of cost reasons, so that a default judgment becomes inevitable.

Scholars have therefore drawn the conclusion that international litigation is unsuitable to solve disputes in many small value internet disputes.²⁰³ An empirical study on the cost of litigation in EU cross-border consumer disputes conducted in 1995²⁰⁴ found that if a consumer pursues a claim of Euro 2000²⁰⁵ at the place of the defendant's residence the costs vary between Euro 980²⁰⁶ and Euro 6600²⁰⁷ depending on the combinations of Member States, with an average of Euro 2489²⁰⁸. If a consumer pursues a claim of Euro 2000 at his or her state of residence and then enforces in the defendant's Member State the costs vary between Euro 950²⁰⁹ and Euro 5850²¹⁰, again depending on the combination of Member States, the average costs being Euro 2437²¹¹.

²⁰¹ See also the OECD's conclusions in relation to consumers in OECD Report 'Consumer Dispute Resolution and Redress in the Global Marketplace' 2006 p. 44; H Perritt 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR' (2000) 15 *Ohio State Journal on Dispute Resolution* 675-703, 675-676

²⁰² H Perritt 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR' (2000) 15 *Ohio State Journal on Dispute Resolution* 675-703, 675-676; Law Commission 'Defamation and the internet' Scoping Study No 2 December 2002, para 4.21

²⁰³ V Heiskanen fn 107 38; H Perritt 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR' (2000) 15 *Ohio State Journal on Dispute Resolution* 675-703, 675-676

²⁰⁴ H von Freyhold, V Gessner, E Vial and H Wagner (Eds) *Cost of Judicial Barriers for Consumers in the Single Market, A Report for the European Commission*, Zentrum für Europäische Rechtspolitik an der Universität Bremen, October/November 2005

²⁰⁵ About £1344

²⁰⁶ About £659

²⁰⁷ About £4435

²⁰⁸ About £1673

²⁰⁹ About £ 638

²¹⁰ About £3931

²¹¹ About £1638

Chapter 3: Internet Disputes

Academic scholars²¹², policy-makers²¹³ and legal practitioners²¹⁴ have demanded the use of alternative forms of disputes resolution. For this reason this thesis focuses on Online Dispute Resolution (ODR) as a way forward for the resolution of internet disputes.

Not just in the context of e-commerce, but more generally there is a noticeable tendency to overcome the cost factor of (even merely domestic) litigation by the use of ADR. Courts in England have now accepted the importance of ADR in complementing litigation. Since the introduction of the Civil Procedure Rules the courts are under an obligation to encourage ADR²¹⁵, if appropriate, and the courts are empowered to impose cost penalties on parties who unreasonably refuse to participate in ADR²¹⁶. Furthermore, the courts have recognised the validity and enforceability of ADR clauses in commercial contracts.²¹⁷

ODR may provide a solution for some internet disputes and the significance of ODR in this respect and how it should be evolved from existing Alternative Dispute Resolution (ADR) is further discussed in the following chapters.

10. Conclusion

This Chapter has explained the characteristics of the internet which make it more likely than before the use of the internet became widespread that individuals become embroiled in cross-border disputes. This involvement of individuals in

²¹² A Patel 'Consumer protection and redress-the wider context' (2000) 3 *Electronic Business Law* 9-10. L Gillies 'A Review of the New Jurisdiction Rules for Electronic Consumer Contracts Within the European Union' [2001] *Journal of Information Law & Technology* (e-journal). V Heiskanen fn 107 38 et seq

²¹³ Art.17 of the E-commerce Directive 2000/31/EC published in OJ L178/1 of 17. July 2000 encourages the Member States to establish out-of-court dispute resolution mechanisms

²¹⁴ J Gunn & W Roebuck 'White Paper on Alternative Dispute Resolution in a Supply Chain Transformed by On-Line Transactions' May 2001, available from the ecentre Legal Advisory Group

²¹⁵ CPR Part 1.4 (2) (e); *Cowl v Plymouth City Council* [2002] 1 WLR 803 (CA)

²¹⁶ CPR Part 44.5; *Dunnett v Railtrack* [2002] 2 AllER 850 (CA); *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1841 (ChD) unreported, para 11-13; but cf *Hurst v Leeming* [2003] 1 Lloyd's Rep 379 (ChD), where the refusal to mediate was justified on the basis that there was no real prospect of success 381.

²¹⁷ *Cable & Wireless Plc v IBM* [2002] 2 AllER 1041 (Comm)-upholding the validity of an ADR clause.

Chapter 3: Internet Disputes

international disputes leads to concerns about access to and power imbalances in dispute resolution and, hence to concerns about fairness. As to power imbalances, this Chapter has described the notion of power in dispute resolution and concluded that this is an extremely multi-faceted concept, but that an important role is played by access to resources and the repeat player effect. In order to simplify the extremely complicated concept of power paradigms a presumption has been introduced that power imbalances are likely to exist for internet disputes in the relationship between a corporate entity and an individual.

This Chapter has explained that the discussion is not limited to e-commerce disputes, but that a wide approach is taken, including all disputes arising from interactions mediated by the internet, including disputes about domain names. It has been acknowledged that some B2C e-commerce disputes (a subset of internet disputes relevant to this thesis) can be solved by intervention of payment providers.

In summary, the main focus of the thesis is on cross-border internet disputes where (i) one party is a corporate entity and the other party is an individual and (ii) there is no access to the courts, because of costs. However the scope of this thesis also encompasses disputes between individuals, where there is no access to the courts for the same reason.

This Chapter has also briefly explained that cross-border litigation is complicated and expensive and will therefore not be suitable for many internet disputes. ADR may provide the way forward and the next chapter will look at ADR and its significance.

Chapter 4: ADR and Applicable Law

*Those, who in quarrels interpose,
Must often wipe a bloody nose.*

(John Gay (1685-1732))

1. Introduction

The function of this Chapter is to explain the meaning of Alternative Dispute Resolution (ADR). This serves as background to the discussion of Online Dispute Resolution (ODR) in the following Chapter. This Chapter concentrates on the two main forms of ADR, mediation and arbitration, discussing their main characteristics, function and limitations. In doing so this Chapter explains why only arbitration is to be regarded as a true alternative to litigation and why mediation is in the nature of a filter for disputes, a complementary, rather than an independent form of dispute resolution.

Since it has been argued that a variant of arbitration (*ie* online arbitration) is the main mechanism to solve such disputes and since arbitration is a form of binding adjudication, this Chapter will also discuss how to identify the applicable law for online arbitration of internet disputes for the Model proposed.

2. The Nature of Disputes and What to Do About Them

Since this thesis is concerned with the fair resolution of internet disputes, it is essential to deliberate about the function and role of different mechanisms to deal with disputes. In this context it is first necessary to consider what amounts to a dispute. In plain and general language, it seems that we talk about a dispute if one person, believing he or she has a right or entitlement, wants something from another

Chapter 4: ADR and Applicable Law

person or wants that other person to do something, which this other person is not willing to give up or do. Defined in this way, a dispute is essentially a legal claim²¹⁸, amounting to a disagreement about justiciable issues.²¹⁹

One way to deal with such a situation is adjudication²²⁰. The essence of adjudication is to have a neutral third person decide whether the second person should give that something to the first person or do what the first person demands. The adjudicator thereby defines the first person's legal rights and entitlements.²²¹

Alternatively, the first person may want to bargain with the other person. Bargaining by its very nature involves the first person persuading the second person that it is in his or her interests to give to the first person what they wish to obtain or to do what the first person wants him or her to do.²²²

Hence, adjudication and bargaining are the two basic methods for resolving disputes. Most disputes are solved informally by the parties (or their lawyers) negotiating between themselves.²²³ Some disputes are formally solved by courts adjudicating. Between these opposite ends of the spectrum of formality lies a range of dispute resolution mechanisms, which do involve a neutral third party, but which are kept outside the courts. These are called Alternative Dispute Resolution (ADR).

²¹⁸ See similarly D Fosskett *The Law and Practice of Compromise* (4th edition, Sweet & Maxwell London 1996) 5. The courts had to consider the meaning of the word 'dispute' in the context of an application for a stay of arbitration proceedings under s.9 (1) Arbitration Act 1996. If the arbitration agreement, for example, allows 'any dispute' to be referred to arbitration. The mere fact that the other party does not respond to the claim and stays passive is sufficient for a dispute to exist, see *Ellerine v Klinger* [1982] WLR 1375 (CA) 1382-1383

²¹⁹ H Brown & A Marriott fn 121 2

²²⁰ Adjudication includes litigation, arbitration and ombudsmen. The term 'adjudication' in this thesis is used as an overarching term to mean a form of dispute resolution involving a third party making a decision binding on the parties.

²²¹ *Lon Fuller* argues that it is the very essence of adjudication that it ultimately defines rights and entitlements, see L Fuller fn 38 369

²²² There are different strategies for negotiation, for example strategies focusing on positions and strategies focusing on interests. The Harvard Negotiation Project has developed a negotiation method, focusing on interests, called 'principled negotiation', a method from which mediation has greatly benefited, see below. A detailed discussion of negotiation theory is outside the scope of this thesis.

²²³ DJ Galligan fn 52 273; M Galanter, M Cahill 'Most Cases Settle: Judicial Promotion and Regulation of Settlements' (1994) 46 *Stanford Law Review* 1339-1391, 1339-1340

3. ADR

ADR is a collective expression for all dispute resolution mechanisms interposing a neutral third party, but outside the courts, and is a synonym for extrajudicial or 'out-of-court' dispute resolution.²²⁴ In this thesis the term includes other adjudicative techniques such as arbitration.²²⁵ The following Figure illustrates the relationship between different forms of dispute resolution:

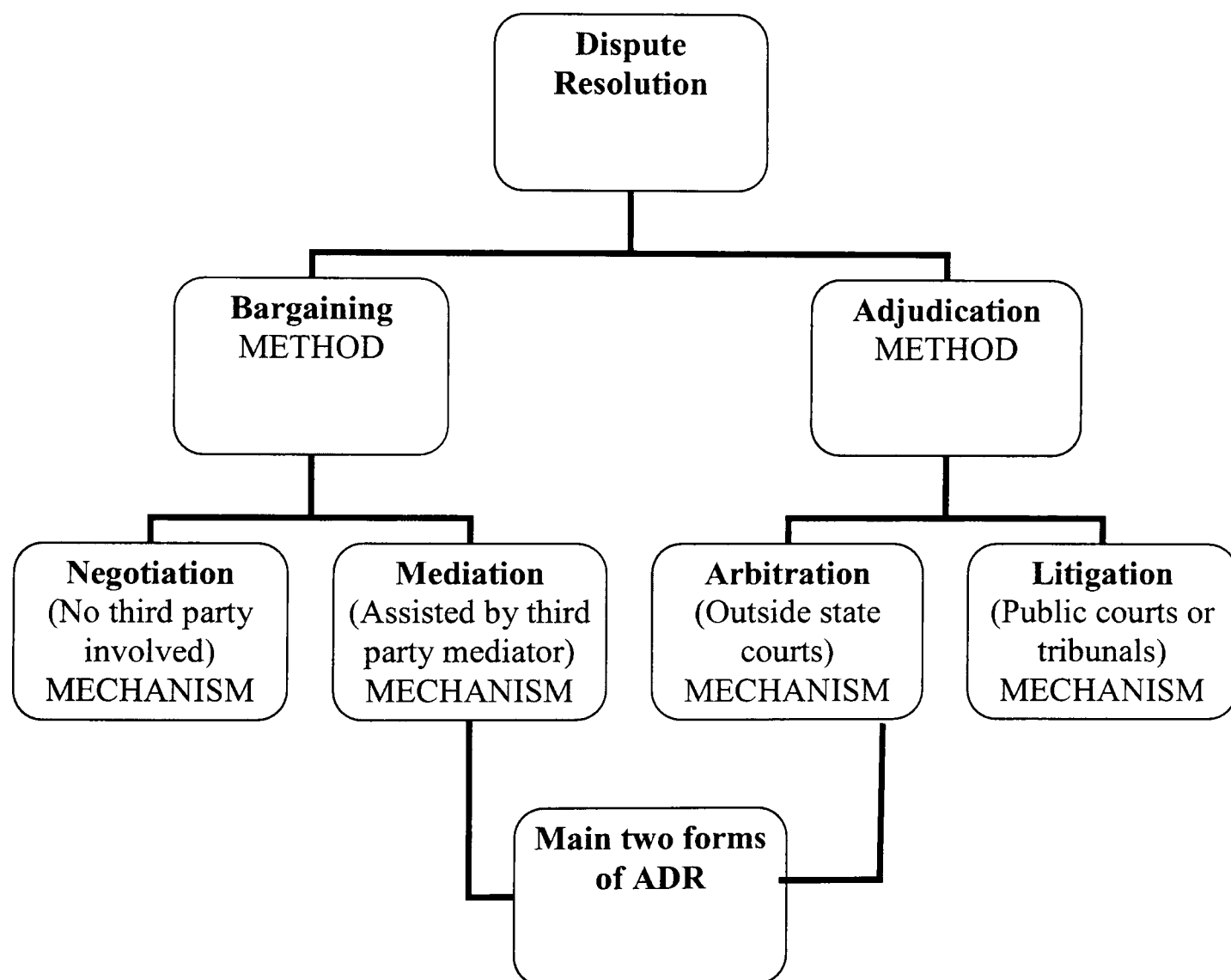


Figure 4: Illustrating the basic methods and mechanisms of dispute resolution.

²²⁴ G Kaufmann-Kohler, T Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International The Hague 2004) 6; C Rule *Online Dispute Resolution for Business* (Jossey-Bass San Francisco 2002) 13; H Brown & A Marriott fn 121 12; The Central London County Court Pilot Mediation Scheme, Evaluation Report by H Genn, Lord Chancellor's Department July 1998 para. 1.1.1

²²⁵ Some authors exclude all adjudication/arbitration from the scope of ADR see N Vidmar 'Procedural Justice and Alternative Dispute Resolution' Chapter 6 in K Röhl, S Machura (eds) *Procedural Justice* (Ashgate Dartmouth 1997) 121-136, 121; K Mackie, D Miles, W Marsh, T Allen *The ADR Practice Guide* (Butterworths London 2000) 9

Chapter 4: ADR and Applicable Law

The adjective 'alternative' in ADR connotes that ADR was conceived to be an alternative to the state court system. In the 1970s and 1980s the ADR movement, consisting to a large part of academic scholars, advocated the increasing use of ADR and conceptualised ADR as a distinct subject, in response to deficiencies in the official court system, particularly in the US.²²⁶ However, it should be pointed out that the mechanisms of arbitration and mediation have been used long before in various contexts.²²⁷

The foundation of all ADR processes is the agreement of the parties to submit their dispute to the neutral third party- this consent is necessary for all dispute resolution mechanisms outside the courts.²²⁸

The advantages of ADR are that the parties, at least in theory, have more control over the process and it has been shown in empirical research that process control is important for the parties' satisfaction with the dispute resolution process.²²⁹ The parties to ADR can choose the procedure to be used and influence the procedural rules. Furthermore the parties select the arbitrator(s) or the mediators. The parties may well choose someone with expertise in the subject-matter of the dispute and they will select someone they trust, hence creating legitimacy of the process. In some cases the parties' preference may be for confidentiality²³⁰, which ADR, but

²²⁶ G Kaufmann-Kohler, T Schultz fn 224 6; C Rule fn 224 15. Roger Fisher and William Ury first published their famous book *Getting to Yes* in 1974 or Laura Nader's *No Access to Law: Alternatives to the American Legal System* (Academic Press New York 1980); C Menkel-Meadow 'Toward another View of Legal Negotiation: the Structure of Problem-Solving' (1983-1984) 31 UCLA Law Review 754-842

²²⁷ A detailed discussion of the history and use in other cultural contexts of arbitration and mediation is outside the scope of this thesis. Many authors cite arbitration between merchants in Mediaeval Europe as the origin of contemporary arbitration, but arbitration was also known in Roman times. The first English arbitration statute dates from 1698 and one of the oldest arbitration institution was the London Court of International Arbitration, founded in 1892. see for more detail A Redfern, M Hunter *Law and Practice of International Commercial Arbitration* (4th edition, Sweet & Maxwell London 2004) 3-6. Mediation, as an informal dispute resolution process, has, in one form or another, been practiced in all societies.

²²⁸ Consent signifies the waiver of the right to go to court, see 6-2.5. 7-2

²²⁹ N Vidmar fn 225 125. P Houlden, S La Tour, L Walker, J Thibaut 'Preferences for Modes of Dispute Resolution as a Function of Process and Decision Control' (1978) 14 *Journal of Experimental Social Psychology* 13-30, 26-27

²³⁰ 6-6

Chapter 4: ADR and Applicable Law

not the public state courts can provide. Finally, in most cases, ADR is more informal and in some cases also cheaper²³¹.

Mediation in addition has further advantages over adjudication (both litigation and arbitration) in that it is even more informal, can resolve (or even remove) the dispute by more creative and efficient solutions and it is, at least in principle, less confrontational, thus preserving existing relationships (if applicable). Mediation can create more efficient solutions by ‘enlarging the pie’.²³² This is further discussed in the next section.

While arbitration and mediation are the two basic forms of ADR, there are many variations and hybrid forms, such as med-arb (using the two forms consecutively), expert evaluation (mediation with an expert issuing a recommendation) or mini-trial (having a senior figure recommending a decision after representation of argument by the parties).²³³ However a detailed discussion of these hybrid forms and variants is outside the scope of this thesis, which will focus on the two main forms, mediation and arbitration.

3.1 Mediation

3.1.1 Mediation explained

Mediation is a form of dispute resolution whereby a third party mediator brokers a settlement between the parties. It is essentially a process of negotiation, which is structured and influenced by the third party mediator. His or her role in negotiation

²³¹ The degree of informality in ADR varies and so does the cost. Whereas judges are paid by the state, arbitrators and mediators will charge their time to the parties, a factor which makes ADR potentially more expensive than litigation. However to the extent that ADR uses shorter procedures and less evidence than the courts it may be cheaper. The role of using technology and the resulting efficiency is explained in 5-5.1, 5-5.2

²³² Despite these advantages it seems that take-up of a voluntary option to mediate a dispute is low among parties in civil disputes, about 5% during the Central London County Court Pilot Mediation Scheme, fn 224 paras. 1.1.4, 2.1.1, 2.1.2; S Merry, S Silbey ‘What do Plaintiffs Want? Reexamining the Concept of Dispute’ (1984) 9 (2) *Justice System Journal* 151-178, 152

²³³ See H Brown & A Marriott fn 121 17-19

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is to facilitate the parties' endeavour to reach a settlement through a series of joint meetings and private meetings with each party separately ('caucuses').²³⁴

The parties can agree to submit their dispute to mediation either before or after the dispute arises. A mediation agreement is not a mere agreement to negotiate²³⁵, but binding on the parties, if the parties' obligations are sufficiently clear.²³⁶ In *Cable & Wireless plc v IBM UK Ltd* a mediation clause was held to be enforceable, since it referred to an institution and specified procedure and the court held that the parties' obligation was to participate in the process of initiating the mediation, selecting a mediator and presenting the mediator with the case and relevant documents.²³⁷

A distinction is usually made between facilitative and evaluative mediation.²³⁸ The former mode is slightly more limited in that the mediator merely assists the parties in finding their own agreement without making recommendations or suggestions. In the latter mode the mediator evaluates the parties' respective positions and makes a recommendation as to the terms of the settlement. Such recommendations may be based on the mediator's view of the legal merits of the case or in a non-legalistic, pragmatic context on the mediator's view of what are reasonable terms of settlement.²³⁹

It should also be pointed out that a settlement agreement is a contract and cannot directly be enforced before the courts as a court order. Hence in the case of non-compliance with a settlement, the deprived party would have to start court proceedings to enforce contractual entitlements.²⁴⁰

²³⁴ H Brown & A Marriott fn 121 127; K Mackie et al fn 225 11

²³⁵ Not enforceable under English law: *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297 (CA) 301

²³⁶ *Cable & Wireless plc v IBM UK Ltd* [2002] (Comm) paras 23-24, 34

²³⁷ Ibid para 24, 29

²³⁸ This distinction is slightly theoretical, as in reality there is no absolutely clear line between these two forms, which is more a matter of degree.

²³⁹ K Mackie et al fn 225 11-12, 49

²⁴⁰ Unless the settlement was reached in the context of pending litigation, in which case in England it can be drawn up as a Consent Order (or 'Tomlin' Order after the case of *Tomlin v Standard Telephones and Cables* [1969] 3 AllER 201 CA)

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The distinctive feature of mediation is that the parties *agree* the terms of their settlement. A mediator does not impose a decision or solution on the parties. The parties initially only agree to participate in the procedure, but ultimately decide during the process if they settle and on what terms. The parties can discontinue the process at any stage and ‘walk away’. They are not bound until they have completed a binding settlement agreement and in this sense, mediation is a voluntary process.²⁴¹ Even mediation under a binding mediation agreement is voluntary, as the obligation is limited to initiating and attempting the process, but this obligation does not prevent the parties from discontinuing the mediation.²⁴²

From this description it should have become clear that the goal of mediation is an agreed settlement, not a decision about each party’s rights and entitlements, as in adjudication. This means that the goal of mediation is fundamentally different from that of adjudication and this is further discussed in the next section.

3.1.2 How mediation works and its purpose

As has been discussed above, negotiation moves by the parties considering and measuring up their respective interests, albeit each from their own subjective perspective. This statement equally rings true for mediation, which, as has been pointed out above, is a form of third party assisted negotiation.

One measurement of the parties’ respective interests is an assessment of their legal rights and entitlements. In other words, the parties’ rights and entitlements inform their respective interests to settle or not to settle. Both parties are likely to consider what would happen if they could not reach agreement and this entails an evaluation of how an adjudicator would decide the case.

²⁴¹ H Brown & A Marriott fn 121 129 Unlike arbitration, where, if the parties have entered into a valid arbitration agreement, and if the submission is in accordance with the arbitration agreement, the arbitrator may issue a directly enforceable default award, even if the respondent refuses to co-operate in the procedure.

²⁴² *Cable & Wireless plc* fn 236 paras 22,29

Chapter 4: ADR and Applicable Law

However, collaterally, the parties will also weigh up access to and the costs of adjudication.²⁴³ These costs include the delay involved and expense of adjudication, emotional factors and the fact that an adjudicator is restricted to particular remedies, whereas a settlement agreement may contain a variety of solutions²⁴⁴. Hence a party usually will be prepared to accept slightly less than what they would obtain through adjudication or a party usually will be prepared to give slightly more than what they would have to if ordered by an adjudicator, taking into account the costs of adjudication. These factors depend, however on each party's subjective perception of the merits of the case and the costs of adjudication, as both factors are impossible to predict with certainty. Hence, the risk adverse person is likely to be in a disadvantaged bargaining position.²⁴⁵

On the other hand, if it is clear that one party has no access to binding and coercive adjudication (since the costs vastly exceed the value of the claim) the other party (if defendant) may not be prepared to settle at all or the other party (if claimant) may obtain a settlement exceeding any adjudicated decision.²⁴⁶ As will be seen below, this raises serious questions of availability of redress and fairness.

By way of illustration, if each party bears its own costs, the claimant's desire to settle could be expressed as $S > A - CC$, 'S' standing for settlement, A being the adjudicated decision and CC the claimant's costs. The defendant's desire to settle could be expressed as $S < A + CD$, CD standing for the costs of the defendant. Therefore if the claimant's costs are very high, the claimant will be prepared to settle low. If the defendant's costs are very high, the claimant can obtain a settlement substantially exceeding the adjudicated decision. However in a court system, where the winner pays the loser's cost, assuming that it is clear that the

²⁴³ See also R Mnookin, L Kornhauser 'Bargaining in the Shadow of the Law: the Case of Divorce' (1979) 88 *The Yale Law Journal* 950-997, 971-972

²⁴⁴ See the music band example in the text below. A court of law can only award the remedies provided for by law

²⁴⁵ R Mnookin, L Kornhauser fn 243 979

²⁴⁶ C Menkel-Meadow fn 226 834

Chapter 4: ADR and Applicable Law

claimant will win, the respective settlement desires would be $S > A$ (claimant) and $S < A + CC + CD$ (defendant). Hence, if the costs of either party are very high the claimant could obtain a settlement vastly exceeding the adjudicated decision. Under English civil procedure either party can make an offer to settle. If the offeree does not accept the offer, but does not succeed to obtain a better bargain at trial, that party will be responsible for the offeror's costs incurred after the offer has been made.²⁴⁷ The defendant could use a Part 36 offer to prevent the claimant from using its bargaining power to obtain a settlement vastly exceeding the likely adjudicated decision. On the other hand, if there is a chance that the claimant may lose the case and bear the whole costs, CC plus CD, the defendant may be less likely to settle at the likely adjudicated decision. Again the claimant in that case could use the Part 36 offer to put pressure on the defendant. Hence under English civil procedure rules there are mechanisms to level out the unfair bargaining power derived from the cost risk. However this system is not perfect, as courts rarely award the whole costs to the winning parties and litigation is very expensive, which may lead a risk-averse party to settle well below or above the adjudicated decision.

So, two important factors in mediating a solution to a dispute are the perceived outcome of adjudication balanced with the feasibility and costs involved in adjudication.²⁴⁸ This is the meaning of the phrase that mediation takes place 'in the shadow of the law'.²⁴⁹

But it should also be pointed out that, in some disputes, factors other than those related to the feasibility and outcome of adjudication strongly influence the parties' respective interests in negotiation and mediation.

If the dispute is genuinely about one single issue, such as how much compensation should a perpetrator of a tort pay to the victim, then there is little scope for aligning

²⁴⁷ Part 36 Civil Procedure Rules 1998

²⁴⁸ E Clark, G Cho, A Hoyle 'Online Dispute Resolution: Present Realities, Pressing Problems and Future Prospects' (2003) 17 (1) *International Review of Law Computers and Technology* 7-25, 16

²⁴⁹ Coined by the art.of R Mnookin, L Kornhauser fn 243 968; see also C Menkel-Meadow fn 226 766

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the parties' interests through a compromise other than a linear solution, whereby the parties meet somewhere between the claimant's monetary demands and the defendant's offer to pay compensation.

On the other hand, many disputes will involve multiple issues and the parties' preferences for each issue can be adapted to achieve the solution optimal for both parties.²⁵⁰ In fact, the most important task of mediation is to find such an optimal solution, satisfying as many interests of the parties as possible.

This becomes clearer if one makes a distinction between positions and interests. A position is what the party says he or she wants, whereas his or her interests are the motivation behind that position. If a different position equally satisfies the underlying interest, parties may well be able and willing to change their position. *Roger Fisher & William Ury* argue that reconciling interests works much better than reconciling positions, as for every interest there might exist more than one position and frequently a different position than the one initially taken satisfies both parties' respective interests.²⁵¹

One famous and simple example²⁵² for this is the story of two children arguing about who should have the last orange in the fruit bowl. A parent adjudicating this 'case' might merely focus on the question of which of the two children has a better entitlement to the orange, for example one child may have eaten three oranges already, whereas the other child has had none. By contrast, mediating between the children might involve an examination of the reasons why each child wants to have the orange. The first child might want to have the orange in order to grind the rind for making a cake, whereas the other child may want to eat the flesh, in which case

²⁵⁰ H Brown & A Marriott fn 121 130; C Menkel-Meadow fn 226 795; L Fuller 'Mediation-Its Forms and Functions' 44 *Southern California Law Review* 305-339, 316-317

²⁵¹ R Fisher, William Ury 'Getting to Yes: Negotiating an Agreement without Giving In' (2nd edition Random House London 1992) 42-43

²⁵² C Menkel-Meadow 'Toward another View of Legal Negotiation: the Structure of Problem-Solving' (1983-1984) 31 *UCLA Law Review* 754-842, 771 or see also R Fisher, William Ury 'Getting to Yes: Negotiating an Agreement without Giving In' (2nd edition Random House London 1992) 41, 58-59

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an obvious solution has been found, which fully satisfies both children's interests underlying the demand to have the orange.

However, whether such a straightforward solution can be found, depends on the peculiar facts and circumstances of each case.

One further, less theoretical, but anecdotal example may further support and illustrate this argument. In one case solved by mediation, the claimant had ordered a jazz music band for a corporate entertainment function from the defendant's agency business organising such events. Through a series of unlikely and unfortunate events (rather than the defendant's incompetence) she had to cancel the band's performance at the last minute. It seemed that under the terms of the contract she was likely to be in breach of contract and a court would have been likely to award damages. However the claimant agreed to attempt mediation and was persuaded that the breach had not occurred because of the negligent or careless operation of the defendant's business, but because of a series of unfortunate events. Hence, the claimant agreed to have a certain number of free performances in lieu of compensation, but exceeding in monetary value the amount of damages, he was likely to receive from a court. This solution satisfied the interests of both parties: the defendant was spared negative publicity, did not have to pay damages and costs and obtained a satisfied customer, whereas the claimant obtained something of greater value than the monetary compensation he would have been entitled to.

However, again this solution only worked because of the particular circumstances of the case. It worked for the reason that the defendant trusted the claimant to render satisfactory performances in the future and for the reason that he happened to require further, regular performances after the one that had failed.

Clearly, only some disputes lend themselves to such neat solutions. It is argued here that it is exactly the function of mediation to find out the parties' respective interests and align the resulting preferences in such a way that the solution satisfies

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each party's interests. However not all disputes can be solved in this way. In some factual scenarios, the underlying interests of the parties cannot be aligned and it is therefore necessary to resort to adjudication.²⁵³

In the literature on the purpose of mediation and its value, the debate is largely bipolar and focuses on a 'either or' approach- mediation is either a 'good institution' or a 'bad institution'.

Some authors²⁵⁴ argue that mediation is preferable to adjudication for the reason that it makes eminent sense to base dispute resolution on the parties' interests rather than their legal rights or entitlements. These authors point to the advantages of mediation such as preservation of ongoing relationships²⁵⁵, parties having greater control over their dispute and the availability of more flexible solutions tailored to the parties' needs and possibly, in some instances, reduced costs.

Other authors²⁵⁶, by contrast, argue that adjudication according to law is preferable, as mediation may lead a party to renounce his or her rights and entitlements.

These authors also argue that mediation is contrary to the notion of justice and fairness²⁵⁷. At first glance it may indeed seem that mediation is contrary to fairness, as mediation is partly an irrational process, not entirely based on the parties' rational arguments about facts and law, but on bargaining about interests.²⁵⁸ This involves strategic behaviour and inducing the opponent, regardless of the quality of his or her arguments, to agree to a settlement. This aspect of mediation may

²⁵³ A detailed examination of what types of disputes are suitable for compromise and a quantitative analysis of what percentage of disputes are suitable for settlement is outside the scope of this thesis. See also similar H Edwards 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 *Harvard Law Review* 668-684, 678- he points out that the 'broken telephone' theory of disputes is wrong- disputes are not only about mis-communication, some conflicts may not be solved through mere realignment of interests.

²⁵⁴ C Menkel-Meadow fn 226 757; K Mackie et al fn 226 14-15; M Cappelletti fn 49 289-290

²⁵⁵ Mediation tends to adopt a problem-solving approach and is frequently less confrontational. H Brown & A Marriott fn 121 131

²⁵⁶ N Vidmar fn 225 123; DJ Galligan fn 52 16, 276; O Fiss 'Against Settlement' 93 *Yale Law Journal* 1073-1090, 1085-1086; M Galanter, M Cahill fn 223 1364, 1385-6

²⁵⁷ Ibid, see also 2-5

²⁵⁸ L Fuller fn 38 367

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enhance power imbalances between the parties.²⁵⁹ *Habermas* for example, argues that the outcomes of negotiation processes²⁶⁰ are less fair than those reached through court procedures, which have institutionalised equality built into the process through due process.²⁶¹

It is argued here that the apparent conflict between these opposing views can be resolved if one regards mediation not as an alternative, but as complementary to adjudication.

Mediation is not about fair resolution of disputes.²⁶² This is not to say that mediation is unfair. The function of mediation is to attempt to analyse the parties' interests underlying their position and reformulate their preferences in such a way that the dispute is removed. Therefore mediation is about removing disputes, not about solving them fairly. In the example of the children fighting about an orange it is irrelevant whether it is fair or not that the child who is allowed to eat the last orange's flesh has already consumed three oranges, whereas the child, who wants to bake the cake, has eaten none. The fact that child baking the cake merely wishes to use the rind has completely removed the dispute. Hence fairness in mediation is limited to enabling communication between the parties and reformulating positions and does not involve designing procedures to enable the fair resolution of disputes.

However, mediation becomes unfair if one party feels pressurised in accepting a compromise, not reflecting that party's interests and not reflecting that party's rights and entitlements.²⁶³ This is more likely to occur if adjudication is not available or accessible because of the costs of adjudication discussed above. In other words a lack of accessible and affordable adjudication affects the fairness of mediation. Hence, access to adjudication guards against unfairness in mediation.

²⁵⁹ The Central London County Court Pilot Mediation Scheme, Evaluation Report fn 224 para. 7.7.5-6

²⁶⁰ He speaks about negotiation generally

²⁶¹ J Habermas fn 76 218-219; L Fuller fn 38 366-367 and 2-5. The problem with this argument, though is that in practice, strategic behaviour in litigation and the costs of litigation also increase power imbalances between the parties.

²⁶² C Menkel-Meadow fn 226 816 and L Fuller fn 250 307-308

²⁶³ N Vidmar fn 225 124; DJ Galligan fn 52 274-279; O Fiss fn 256 1076-1078

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Furthermore, mediation should not always lead to a settlement for two reasons. As has just been discussed, mediation only works if the circumstances of the case lend themselves to a compromise.²⁶⁴ Secondly, as has been discussed in the previous section, mediation is voluntary, not coercive and for this reason also it cannot provide an avenue of redress for all cases, since a party can terminate the process at any stage. In other words mediation does not obviate the need for binding adjudication in some cases.

For these reasons in this thesis, only arbitration is regarded as a true alternative to litigation. For this reason fairness and due process issues in mediation are not examined further.²⁶⁵

In conclusion, the argument advanced here is that mediation should be provided in conjunction with adjudication, rather than as an alternative to adjudication.²⁶⁶

Mediation should be attempted before adjudication (unless it is obvious that it will fail). As a preliminary process, it has an important and useful filtering function. It filters out those disputes which lend themselves to a compromise, removing disputes and thereby making adjudication unnecessary. However, it is crucial that adjudication is available and accessible for those disputes not lending themselves to compromise. Hence the linchpin of the fairness argument is whether arbitration, as an alternative to litigation, can be made fair. This thesis will therefore focus on arbitration and how it can be made fair.

²⁶⁴ DJ Galligan fn 52 274-276

²⁶⁵ It has been argued above that the purpose of mediation is to remove the dispute between the parties rather than to solve it fairly. This purpose can be jeopardized if a mediator is biased, for example. In fact neutrality of the mediator is a value asserted, but rarely measured- pointed out by S Cobb, J Rifkin 'Practice and Paradox: Deconstructing Neutrality in Mediation' (1991) 16 *Law and Social Inquiry* 25-63, 39. There are other due process issues such as accountability and confidentiality, eg P Robinson 'Centuries of Contract Common Law Can't Be All Wrong' [2003] *Journal of Dispute Resolution* 135-173, 16; see also S.6 US Uniform Mediation Act and Art.6 (3) (a) of the Draft EU Mediation Directive of 22. October 2004, COM(2004) 718 final. However, as this thesis focuses on arbitration, these issues are not discussed here.

²⁶⁶ See also similar H Edwards 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 *Harvard Law Review* 668-684, 675

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3.2 Arbitration

Arbitration is a form of private adjudication whereby a neutral third party, the arbitrator²⁶⁷ chosen and paid by the parties makes a binding and enforceable decision (called an award) as to how the dispute should be solved. The arbitrator will usually decide the case according to authoritative standards set by the applicable law(s).²⁶⁸ Therefore, like in litigation, the arbitrator will hear evidence to establish the facts and decide on the relevant law. However, unlike litigation, the procedure used to arrive at the award is more flexible and usually determined by the parties or rules chosen by the parties (principle of party autonomy).²⁶⁹

The basis of the arbitrator's jurisdiction is the parties' agreement to submit the dispute (or disputes of this type) to arbitration. The agreement to arbitrate is the cornerstone of arbitration. There can be no arbitration without agreement.²⁷⁰ One exception to this is statutory arbitration, in England recognised according to sections 94-98 of the Arbitration Act 1996.

This arbitration agreement can be made either before or after the dispute has arisen and it is binding on the parties.²⁷¹ If one party starts court proceedings in a dispute within the remit of the arbitration agreement and the other party objects, the court stays proceedings.²⁷²

²⁶⁷ Or a panel of (usually three) arbitrators

²⁶⁸ Applicable law in 4-4. The arbitrator's duty to give reasons in 6-5

²⁶⁹ Sections 1 (b) and 34 (1) Arbitration Act 1996, Art.1460 (1) French Nouveau Code de Procédure Civile, the German Arbitration Act §1042 (3) and Art.26 (1) Japanese Arbitration Act of 2003- party autonomy is discussed in 6-2.5, 6-4.2.3

²⁷⁰ A Redfern, M Hunter *Law and Practice of International Commercial Arbitration* (4th edition, Sweet & Maxwell London 2004) 6-7, 9,155; JDM Lew & LA Mistelis & SM Kröll *Comparative International Commercial Arbitration* (Kluwer Law International The Hague 2003) 3-4, 99; s.30 (1) Arbitration Act 1996, which requires as one of the prerequisites to the tribunal's jurisdiction a valid arbitration agreement and Art.II (1) of the NYC which states that the Contracting States should recognise an arbitration agreement in writing and provides in Art.V (1) (a) that recognition and enforcement may be refused if there is no valid arbitration agreement- *Harry L Reynolds v International Amateur Athletic Federation* (1996) XXI YBCA 715 and *Oberlandesgericht (Court of Appeal) Rostock* 22. November 2001 No.1 Sch 03/00 (2004) XXIX YBCA 732

²⁷¹ Mediation agreement binding- 4-3.1.1

²⁷² S.9 (4) Arbitration Act 1996, Art.1458 French Nouveau Code de Procédure Civile. German Arbitration Act §1032 (1), Art.14 (1) Japanese Arbitration Act of 2003

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Unlike mediation, arbitration is mandatory, *ie* once the parties have submitted to arbitration they cannot withdraw from the process. If the respondent refuses to participate in the arbitration, the arbitrator may issue a default award.²⁷³

The arbitration award can be directly enforced, similar to a judgment.²⁷⁴ Hence, unlike mediation, arbitration is coercive. Furthermore, the New York Convention²⁷⁵ provides that, subject to narrow exceptions²⁷⁶, contracting states must enforce a foreign arbitration award.²⁷⁷ The wide-spread ratification of the New York Convention²⁷⁸ ensures that arbitration awards are enforceable across most borders, unlike court judgments, for which the enforcing party has to rely on notions of comity in the enforcement jurisdiction or a bilateral or multilateral enforcement treaty.

An arbitration award is also final in the sense that awards have *res judicata* effect, *ie* once an award has been made and unless the award is successfully challenged, the same matter cannot be brought before a court or arbitration tribunal again.²⁷⁹

Therefore, in contrast to mediation, arbitration is binding and mandatory, leading to a directly enforceable award with *res judicata* effect. Because of these characteristics of arbitration compared to the characteristics of mediation discussed above, only arbitration can be a true alternative to litigation as a binding and enforceable avenue for redress for internet disputes.

²⁷³ S.41 (4) Arbitration Act 1996, German Arbitration Act §1048, Art.33 Japanese Arbitration Act of 2003

²⁷⁴ S.66 Arbitration Act 1996, Art.1476 French Nouveau Code de Procédure Civile, German Arbitration Act § 1055, Art.45 (1) Japanese Arbitration Act of 2003

²⁷⁵ 330 UNTS 3 (NYC) adopted New York 10. June 1958, entered into force on 7. June 1959

²⁷⁶ Art.V NYC

²⁷⁷ Art.III NYC

²⁷⁸ On 12. September 2007 142 states had ratified the NYC

²⁷⁹ S. 58 (1) Arbitration Act 1996; A Redfern, M Hunter fn 270 459

4. Applicable Law

It has been argued in this Chapter generally that mediation operates in the shadow of the law and that a binding form of resolution is required to complement mediation, if a dispute cannot be solved by way of compromise. For disputes internal to one jurisdiction, litigation complements mediation and vice versa. However it has been shown in the last Chapter that the jurisdictional challenge of cross-border litigation is an argument in favour of using extra-judicial means of dispute resolution for internet disputes. Combining these two arguments, for internet disputes, mediation should be complemented by arbitration as a binding form of extra-judicial dispute resolution, which has *res judicata* effect and which, thanks to the New York Convention can be enforced across national borders²⁸⁰.

Since arbitration is mainly based on decisions based on legal rules and standards, in cross-border internet disputes, it is necessary to answer the question of which legal rules apply or should apply to an international dispute.

4.1 Law of the arbitration agreement, the *lex arbitri* and applicable law distinguished

In arbitration, the question of ‘which law applies’ can be raised in three different contexts: (i) The law of the submission agreement or arbitration clause itself in deciding its validity and scope, (ii) the law of the seat of the arbitration, which provides the procedural framework for the arbitration, and (iii) the law applicable to the substantive issues between the parties (the applicable law). The main focus of this section is on (iii), applicable law, but the other aspects should be mentioned briefly.

As to (i), this will frequently be the same as (iii) if the parties have made an express choice and the agreement to arbitrate is contained in a clause of the main agreement

²⁸⁰ 6-2.6, 6-7, 8-4.3

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between the parties.²⁸¹ However, some courts have found that the scope and validity of the arbitration agreement (whether contained in a submission agreement or a clause) should be governed by the law of the seat.²⁸² The courts in the place of enforcement, if this is in a state being a contracting state to the New York Convention, would have to examine validity in conformity with the provisions of that Convention and international public policy.

As to (ii), the *lex arbitri* establishes the procedural framework of the arbitration²⁸³ and attaches the arbitration to a jurisdictional forum²⁸⁴. The New York Convention still refers to the *lex arbitri* as the ‘law of the country where the arbitration took place’²⁸⁵ or as the ‘law of the country where the award is made’²⁸⁶. This actual territorial connection between the *lex arbitri* and the place where the actual arbitration is taking place is, as a matter of fact, becoming more and more tenuous, as with modern air travel and instant communication, the arbitration may be held in more than one place and, with online arbitration, in no particular place at all. Therefore, modern arbitration legislation and rules usually provides that the *lex arbitri* is chosen by the parties in their agreement to arbitrate. The parties can also empower the arbitral institution (if any) or the tribunal to designate the seat.²⁸⁷

²⁸¹ *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48 (Comm) 49-50, *Sonatrach Petroleum Corporation (BVI) v Ferrell International Ltd* [2002] 1 AllER 627 (Comm) para 32; see Hanseatisches Oberlandesgericht (Court of Appeal), Hamburg 24. January 2003, No.11 Sch 06/01 reported in (2005) XXX YBCA 509 para 16; CMV Clarkson, J Hill *The Conflict of Laws* (3rd edition Oxford University Press 2006) 252

²⁸² Case No T1881-99 *Bulgarian Foreign Trade Bank Ltd v Al Trade Finance Inc* (2001) XXVI YBCA 291 (Swedish Supreme Court), Judgment of 27. October 2000; *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500 (Comm) 508; CMV Clarkson, J Hill fn 281 252

²⁸³ The principle of party autonomy in arbitration means that the party can, to a large extent determine the procedure they wish to follow. Chapter 6

²⁸⁴ Some scholars have argued that international commercial arbitration should be delocalised, *ie* only controlled by the courts at the place of enforcement, see for example J Paulsson ‘Delocalisation of International Commercial Arbitration: When and Why It Matters’ (1983) 32 International and Comparative Law Quarterly 53-61. However this is only possible if the *lex arbitri* does allow for this. see A Redfern, M Hunter *Law and Practice of International Commercial Arbitration* (4th edition, Sweet & Maxwell London 2004) 108. A detailed examination of the arguments in favour and against delocalization are outside the scope of this thesis.

²⁸⁵ Art.V (1) (d)

²⁸⁶ See Art.V (1) (a), (e)

²⁸⁷ S.3 Arbitration Act 1996 provides that the seat is designated by the parties or by the arbitral or other institution or person vested by the parties with powers in that regard, or by the arbitral tribunal if so authorised by the parties. The UNCITRAL Rules, Art.16 (1) go even further by stipulating that if the

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Therefore, now, the seat of arbitration is a designated place rather than the actual territory in which the arbitration takes place. Since the seat and, hence the *lex arbitri* can be agreed by the parties, the choice of the procedural law is much more flexible than in litigation and hence more suitable to international, cross-border disputes.

The law applying to the substantive issues in dispute is probably more contentious and the parties may find it harder to agree the applicable law. For this reason, the remainder of this section focuses on applicable law.

4.2 Options

Before discussing how the applicable law is determined, it might be useful to consider the different options amongst which a choice must be made.

First, in most cases, the applicable law will be the law of a particular jurisdiction (either a national, state or federal law). Applying the law of a jurisdiction has the advantage that this constitutes a developed, mature legal system, geared up to provide an answer for any legal problem and that such a system is capable of interpretation by lawyers trained in it, thereby providing reasonable certainty.²⁸⁸

Secondly the applicable law may consist of international law²⁸⁹, or an aspect of international law, such as the general principles of international law²⁹⁰. Applying

parties cannot agree on the seat, the arbitral tribunal will make the choice for them and so does the UNCITRAL Model Law in Art.20 (1). Similar the ICC Rules which state in Art.14 (1) that the place of arbitration will be fixed by the ICC's Court of Arbitration if the parties have not agreed.

²⁸⁸ A Redfern, M Hunter fn 270 115

²⁸⁹ S.46 English Arbitration Act 1996 only allows the tribunal to apply international law if the parties have agreed not to apply the law of a particular jurisdiction. S.1051 (2) German Arbitration Act 1998 takes an even more conservative approach- it only allows the application of international law if the parties have expressly agreed that international law should apply. By contrast, Art.1496 the French Nouveau Code de Procedure Civile allows the tribunal discretion- in the absence of choice the tribunal can apply any rules it considers appropriate.

²⁹⁰ Art.38 (1) (c) Statute of the International Court of Justice refers to the 'general principles of law recognised by civilised nations' as a source of law to fill any gaps in international law. These are common themes and principles appertaining to many different legal orders. see M N Shaw *International Law* (5th

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international law to a dispute has the reverse advantage to applying the law of a particular jurisdiction, it is inherently more abstract and flexible and may appear neutral, but may lack certainty and may not be subject-specific. International law is not designed to answer detailed, specific questions of contract law.²⁹¹

Thirdly the applicable law may be transnational law²⁹² such as the UNIDROIT²⁹³ Principles²⁹⁴, the Lando Principles²⁹⁵, CISG²⁹⁶ or *Lex Mercatoria*.

Lex Mercatoria is a modern version of the mediaeval law merchant, consisting of rules and practices of the international business community/communities. It proceeds by comparing different national systems to extract common denominators²⁹⁷ and by looking at international law, such as the UNIDROIT principles, the general principles of international law mentioned above and trade usages (including codes of conduct) to close any gaps.²⁹⁸

edition Cambridge University Press 2003) 94; R Wallace *International Law* (4th edition Sweet & Maxwell 2002) 22-23

²⁹¹ A Redfern, M Hunter fn 270 120-121

²⁹² S.46 English Arbitration Act 1996 only allows the tribunal to apply transnational law if the parties have agreed not to apply the law of a particular jurisdiction. S.1051 (2) German Arbitration Act 1998 takes an even more conservative approach- it only allows the application of transnational law if the parties have expressly agreed that transnational law should apply. By contrast, Art.1496 the French Nouveau Code de Procedure Civile allows the tribunal discretion- in the absence of choice the tribunal can apply any rules it considers appropriate.

²⁹³ UNIDROIT, set up in 1926, is the International Institute for the Unification of Private Law, an independent intergovernmental organisation with seat in Rome

²⁹⁴ Principles of International Commercial Contracts (2004 Edition) containing general contract rules for international commercial agreements, available from <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf> [14. September 2007]

²⁹⁵ The Principles of European Contract Law formulated by the independent Commission on European Contract Law

²⁹⁶ 1489 UNTS 25567, 1980 United Nations Convention on Contracts for the International Sale of Goods (or 'Vienna Convention'), governing aspects of the international sale of goods, where both parties are in Contracting countries or where they have chosen CISG as applicable law

²⁹⁷ Critical on this basis, see LJ Mustill 'The New Lex Mercatoria-the First Twenty-Five Years' (1987) 4 (2) *Arbitration International* 86-119, 92

²⁹⁸ JDM Lew et al fn 270 454

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Some scholars have accumulated lists of rules and principles²⁹⁹, whereas others have adopted a functional approach³⁰⁰. Under this latter approach, *Lex Mercatoria* is merely a method for finding the appropriate rule for the actual problem in question.³⁰¹ Some scholars and practitioners have been sceptical or even hostile, doubting the existence of *Lex Mercatoria* as an identifiable body of law, to which reference can or should be usefully made.³⁰²

Finally, in rare cases, the tribunal may be empowered to decide the case without applying any particular body of law, on the basis of what is fair and reasonable, *ex aequo et bono*³⁰³. This is not further discussed here.

In litigation the courts are limited to applying the law of a particular jurisdiction to the substantive issues in dispute. By contrast in arbitration a wider range of options exists, including international and transnational law, giving the tribunal greater discretion and flexibility.

4.3 Determination of the applicable law

4.3.1 Choice of law

The principle of party autonomy in arbitration means that the parties can choose the law applicable to the substantive issues of the contract and they can expressly avail

²⁹⁹ See, for example the Central Transnational Law Digest & Bibliography by Klaus Peter Berger available from <http://www.tldb.net/> [14. September 2007]

³⁰⁰ A Redfern, M Hunter fn 270 131-132

³⁰¹ E Gaillard (2001) 17 (1) 'Transnational Law: a Legal System or a Method of Decision-Making' *Arbitration International* 59-71, 64, 69

³⁰² LJ Mustill fn 297 92; F Mann 'The Proper Law in the Conflict of Laws' (1987) 36 *International Comparative Law Quarterly* 437-453, 448

³⁰³ S.46 English Arbitration Act 1996; s.1051 (3) German Arbitration Act 1998 only allow the tribunal to act as *amiable compositeur* if the parties have agreed this expressly

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themselves of any of the options listed above.³⁰⁴ This is subject to public policy concerns and the principle of mandatory laws discussed below³⁰⁵.

4.3.2 No choice of law

If the parties have made no discernable choice at all, there are two possibilities of how to deal with this situation³⁰⁶. The applicable law could either be determined according to conflict of law rules³⁰⁷, for example by deciding to which jurisdiction the dispute is most closely connected to³⁰⁸, or by giving the arbitral tribunal a wide discretion in determining the rules and standards according to which it decides the dispute³⁰⁹. Whether the tribunal has to decide according to conflict of law rules or whether it has a discretion concerning the question of the most appropriate rules to apply to the substantive issues in dispute, depends on the arbitration law at the seat of arbitration or on the rules of the arbitration institution.

If a tribunal decides that it has to apply 'traditional' conflict of law analysis it will have to apply the law of a jurisdiction to which these conflict of law rules point. For this, it will have to decide which jurisdiction's conflict of law rules to refer to. In Europe, the law applicable to contracts has, of course, been harmonised in the Rome Convention³¹⁰. Article 1 (2) (d) of that Convention provides that it does not apply to arbitration agreements. However, most scholars have interpreted this exception narrowly, meaning that the conflict of law rules in the Rome Convention do not apply to the submission agreement itself, but do apply to the determination

³⁰⁴ JDM Lew et al fn 270 413; A Redfern, M Hunter fn 270 111-112; S.46 (1) English Arbitration Act 1996; s.1051 (1) German Arbitration Act 1998; Art.28 (1) UNCITRAL Model Law; Art.1496 French Nouveau Code de Procedure Civile; Art.36 (1) Japanese Arbitration Act 2003

³⁰⁵ 4-4.5

³⁰⁶ The parties may not have been able to agree a 'neutral' applicable law.

³⁰⁷ Art.28 (2) UNCITRAL Model Law and s.46 (3) English Arbitration Act 1996: 'the tribunal shall apply the (...) conflict of law rules which it considers applicable', not necessarily English conflict of law rules.

³⁰⁸ Art.36 (2) Japanese Arbitration Act 2003; s.1051 (2) German Arbitration Act 1998, Art.187 (1) Swiss Federal Law on Private International Law 1987

³⁰⁹ Art.1496 the French Nouveau Code de Procedure Civile; Art.17 (1) 1998 ICC Rules

³¹⁰ Rome Convention of 19. June 1980 on the Law Applicable to Contractual Obligations, OJ C027 of 26. January 1998

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of the law applicable to the substantive issues.³¹¹ Article 4 (1) provides that this is the law of the country with which the contract has the closest connection and Article 4 (2) contains a rebuttable presumption that this is the place of habitual residence or place of business of the party carrying out the characteristic performance.

By contrast, if the arbitration tribunal can freely decide which rules to apply to the substantive issues, it is not bound by the results of conflict of law analysis, and, more importantly, it is not restricted to referring to the law of a particular jurisdiction, but may additionally or alternatively apply transnational rules of law³¹².

Finally, if the parties cannot agree on a choice of law, the question arises whether the parties are allowed to confer a power on the tribunal to make this choice for them, by providing, for example, 'that the arbitration tribunal may apply any rules it deems applicable'. Some arbitration laws, even if they do not generally confer discretion on the tribunal to determine applicable law without a conflict of law analysis, allow the parties to expressly empower the tribunal to do so.³¹³

4.4 Conclusion: the challenge of applicable law

Applicable law is important in two respects. First of all, in the previous Chapter³¹⁴, this thesis has mentioned the complexity of applying jurisdiction rules based on localisation factors to internet disputes. For such disputes, determining applicable law in court proceedings also involves considering localisation factors and is equally complex. Since arbitration, like litigation, is based on legal rules and

³¹¹ Report by M Giuliano and P Lagarde on the Rome Convention, OJ C282 of 31. October 1980, Para. 5; CMV Clarkson, J Hill fn 281 256; P North, J Fawcett *Cheshire and North's Private International Law* (13th ed Butterworths London 1999) 548-549; A Redfern, M Hunter fn 270 112, 144

³¹² Under the Rome Convention, the law to be applied must be the law of a state, not transnational law, see D McClean, K Beevers *Morris The Conflicts of Law* (6th edition Sweet & Maxwell London 2005) 339

³¹³ S.46 (1) (b) English Arbitration Act 1996, Art.28 (1) UNCITRAL Model Law

³¹⁴ 3-9

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standards, the question arises whether finding the applicable law poses a similar challenge.

This Section has shown that arbitration takes a more flexible and pragmatic approach than litigation. In arbitration, the choice is not limited to the law of a particular legal system, but may encompass international and transnational legal rules and trade usages, if the parties provide for this. Furthermore, in some jurisdictions, the arbitration tribunal is empowered with wider discretion in deciding which rules to apply. For example, as has been seen³¹⁵, in France the tribunal has a wide discretion to apply the appropriate rules in the absence of choice by the parties. In other jurisdictions, the tribunal may apply any conflict of law rules it determines appropriate, not only the conflict of law rules of the seat. This more flexible, less legalistic approach in giving power to the tribunal means that there will be less argument about applicable law and hence, less delay and expense wasted with preliminary issues. However, since this thesis is concerned with fairness in online arbitration, it should also be examined whether applicable law in arbitration raises fairness issues.

4.5 Mandatory laws

Clearly the determination of which laws and legal standards are applied to a dispute may be decisive for the outcome and may therefore be a crucial and hotly disputed question between the parties. Fairness issues may arise if, in a situation of power imbalance, the 'weaker' party is deprived of mandatory laws designed to protect this 'weaker' party and to counterbalance the weaker bargaining position of that party.³¹⁶ This 'deprivation' may arise because of an express choice of law clause inserted by 'the more powerful party' or because of the tribunal not applying the mandatory law, in the absence of an express choice.

³¹⁵ Fn 289

³¹⁶ 2-2.3.2, 2-5 ; Principle V of EC Recommendation 98/257/EC: S Ware 'Default Rules from Mandatory Rules: Privatizing Law through Arbitration' (1999) 83 *Minnesota Law Review* 703-754, 726

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4.5.1 Mandatory laws explained

The legal concept of mandatory laws in private international law is of course wider than merely counterbalancing power differentials between unequal contracting parties. Mandatory rules are *all* rules of a legal system which cannot be derogated from by contrary contractual provision³¹⁷ or, in the international context, which cannot be avoided by an express choice of law³¹⁸ in the contract and overriding provisions of the applicable law identified by conflict of law rules.³¹⁹ The rationale for mandatory laws is the protection of the public interest overriding party autonomy in contract and, in a conflict of law situation, the recognition that states other than that providing the applicable law may have a public interest in regulating the situation.³²⁰ Mandatory laws embody state, economic or social policy, such as exchange regulations, foreign export prohibitions, import regulation, competition and anti-trust law or mandatory rules which protect the weaker party in consumer, employment, insurance, commercial agents or landlord and tenant relationships.³²¹

³¹⁷ Definition in Art.3 (3) Rome Convention; these are 'internal mandatory rules'

³¹⁸ Generally speaking it seems that before many US courts, the principle of the overriding effect of mandatory laws is much narrower (US doctrine does not express the principle by using the concept of mandatory laws, but in terms of policy. Thus the comparison has to be made by analogy). The US Restatement Second Conflict of Laws provides in §187 (2) (b) that if there is an express or implicit choice of law by the parties, this choice will be overridden by the law applicable in the absence of choice, if (and only if) this chosen law is contrary to a fundamental policy of the state providing the applicable law in the absence of choice and if that state has a materially greater interest than the state providing the chosen law in the determination of the particular issue. This principle is narrower as Art.7 (1) Rome Convention as it only refers to the law applicable in the absence of choice, rather than any foreign mandatory law which has a close connection to the issues and as it only applies where the parties have made a choice of law. With regard to choice of law clauses in the standard terms of consumer contracts (or other contracts where there is a substantial power imbalance), the US applies the doctrine of adhesion contracts. Choice of law clauses contained in adhesion contracts are usually upheld, unless there is substantial injustice to the 'weaker party', see Comment to § 187 in Restatement Second Conflict of Laws. This is in marked contrast to Art.5 Rome Convention. Adhesion contracts are also discussed in relation to consumer arbitration clauses in 7-2.3

³¹⁹ 'International mandatory laws'; N Voser 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 *American Review of International Arbitration* 319-357, 321; CMV Clarkson, J Hill fn 281; P North, J Fawcett fn 311 576

³²⁰ CMV Clarkson, J Hill fn 281 195-196; P North, J Fawcett fn 311 576

³²¹ N Voser fn 319 325

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There are two types of mandatory laws.³²² The first type is the mandatory law of a country which is closely connected to the issues in dispute, but whose law is not the applicable law. Here the mandatory law is a foreign law, different from the applicable law and foreign to the forum. For this type it is necessary to examine the nature of the law itself to see whether it is intended not to be derogated from and to analyse whether there is a sufficient connection to the issues in dispute.³²³

The second type is the limitation of the applicable law by the public policy of the forum. This, in turn, can take two forms. Firstly, the court may consider and apply mandatory norms of the forum itself³²⁴ and secondly the court may refuse to apply a particular aspect of the applicable law on the grounds of incompatibility with the public policy of the forum³²⁵.

4.5.2 Applicability of mandatory laws in arbitration of internet disputes

Having (very) briefly sketched the concept of mandatory law in conflicts of law theory and in particular its implementation in the Rome Convention, it is necessary to return to the question on which this thesis focuses, namely whether an arbitration tribunal (as opposed to a public court) would have to apply mandatory law to internet disputes, in order to redress power imbalances.

Here it should be remembered that the central concern of this thesis is internet disputes between parties subject to a power imbalance and for the purpose of this thesis this power imbalance has been defined as a corporate entity-individual paradigm.³²⁶

³²² CMV Clarkson, J Hill fn 281 195

³²³ See for example Art.7 (1) Rome Convention generally providing for the application of this type of mandatory law- however this provision does not apply in the UK, see s. 2 (2) Contracts (Applicable Law) Act 1990. Subject-matter specific mandatory laws are contained eg in Art.5 (B2C contracts)

³²⁴ Art.7 (2) Rome Convention

³²⁵ Art.16 Rome Convention

³²⁶ 3-6.3

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Traditionally, international commercial arbitration has been conceived to be a form of dispute resolution between business parties of (very) roughly equal bargaining power.³²⁷ Thus, it is not surprising that questions of power imbalances, such as in B2C relationships, have not been central to the doctrines pertaining to international commercial arbitration. The online arbitration of internet disputes introduces a new paradigm here.³²⁸

To what extent arbitration tribunals should take into account mandatory laws is not entirely clear.³²⁹

Some argue that since arbitration is of a private nature, being founded on the agreement of the parties and being carried out by a private tribunal, the principle of party autonomy should play a greater role than in litigation and that therefore no regard should be had to mandatory rules (other than those of the law chosen by the parties).³³⁰ Furthermore, as far as the second type of mandatory laws, *ie* the public policy of the forum, is concerned, it can be argued that due to the private nature of the tribunal, there is no forum and hence no obligation to apply this type of mandatory rules, unless they amount to international public policy.³³¹

This argument is not convincing and in the opinion of the author and many scholars should be rejected³³².

³²⁷ This conception is of course a generalization, to what extent this has been historically accurate will not be further examined here.

³²⁸ 3-2

³²⁹ S.46 English Arbitration Act 1996, s.1051 German Arbitration Act 1998, Art.1496 the French Nouveau Code de Procedure Civile-all silent on the issue of mandatory laws.

³³⁰ JDM Lew et al fn 270 420-421, in particular para. 17-30: 'There is no basis for a tribunal to ignore the express choice of the parties because it determines that there is a contrary mandatory rule in one of these national laws.'

³³¹ JDM Lew et al fn 270 420; N Voser fn 319 330

³³² N Voser fn 319 331, 336-337, 342-343; P Mayer 'Mandatory Rules of Law in International Arbitration' (1986) 1 *Arbitration International* 274-293, 285; D Hochstrasser 'Choice of Law and "Foreign" Mandatory Rules in International Arbitration' (1994) 11 *Journal of International Arbitration* 57-86, 84-85; M Blessing 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 14 *Journal of International Arbitration* 23-40, 31-32 (subject to conditions); A Lowenfeld 'The Mitsubishi case: another view' (1986) 2 *Arbitration International* 178-190, 186-187

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The first reason for this rejection is specific to the narrow focus of the thesis, ie has to be seen in the specific context of internet disputes. Arbitration as adjudication according to laws and legal rules should include those fundamental public policy values agreed in a democratic state, as otherwise it loses its legitimacy as a legal process. To this one could object that the mandatory rules of the law chosen by the parties or that applying in the absence of choice would apply. However, this objection does not hold up against the fairness argument made in Chapter Two, ie that fairness requires that power imbalances be actively counterbalanced. If a stronger party directs its activities towards the territory of the weaker party and then imposes a choice of law on the weaker party, the mandatory rules of the weaker party's jurisdiction should apply in order to achieve this counterbalance.³³³

Secondly, if mandatory law was not applied to arbitration, courts and policy makers would ensure that areas of law containing mandatory laws would not be subject to arbitration. In other words, the consequence of a finding that mandatory rules are inapplicable before arbitration tribunals would be that certain subject-matters, governed by mandatory rules would have to stay outside the ambit of arbitration. The fact that disputes involving laws designed to promote public interest objectives, such as competition law disputes, are now considered arbitrable means that mandatory rules must apply.³³⁴ In fact, this argument could be a political tool in order to obtain agreement for the new conflicts of law rule for arbitration of internet disputes proposed in this thesis. The bargain could be to allow consumer arbitration more generally, against the concession that the mandatory laws in the individual's location apply if the corporate entity directed its activities there.³³⁵

³³³ Principle V of EC Recommendation 98/257/EC; S Ware fn 316 726

³³⁴ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614, 629 105 SCt 3346,87 (1985), where the US Supreme Court enforced an arbitration clause in a dispute involving anti-trust law; Swiss Federal Supreme Court Decision BGE 118 II 193 (1992), where the Court decided that the arbitration tribunal had to take into account EC competition law; N Voser fn 319; A Lowenfeld fn 332 186-187

³³⁵ Chapter 8

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The other two reasons relate to the nature of arbitration as private or public which will be discussed in greater detail in Chapter Six.³³⁶

Arbitration fulfils the same *function* as court proceedings, *ie* adjudicating a dispute according to laws and legal rules, and that hence the same considerations of public interest as reflected in the mandatory rules itself and their applicability should apply. This reason essentially is based on an argument that there should be no discrimination between litigation and arbitration, since both forms of adjudication fulfil a public *function*.

Finally, arbitration can also not be said to be entirely private, since the courts support arbitration through their supervisory and enforcement jurisdiction, and that this public element means that the principle of party autonomy may well have to be balanced with the public interest.

For these reasons, it is argued in this thesis that party autonomy should be restricted to the extent that mandatory laws should be applied, at least in internet disputes³³⁷, if the conditions for their application are fulfilled. What these conditions should be, will be discussed in a later section.³³⁸

4.5.3 Mandatory rules applied in practice

It should be mentioned that while the applicability of mandatory laws in arbitration is not settled, tribunals will consider mandatory laws in some situations as a practical matter, in order to avoid a challenge of the award at the seat or on the basis that it is against the public policy of the enforcing court, but this is usually limited to international public policy.³³⁹

³³⁶ 6-2.5

³³⁷ The wider issue need not be decided here.

³³⁸ 4-4.5.4

³³⁹ If England is the seat of arbitration under s.68 Arbitration Act 1996 (serious irregularity), or in the enforcement court under Art.V (2) NYC. However, the latter only applies if the transnational or international public policy of the enforcement court contradicts the applicable law and will be used

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Furthermore in the specific context of B2C contracts arbitration tribunals in the EU may (although their obligation is unclear) decide to apply mandatory laws. Some jurisdictions impose restrictions on consumer arbitration, with the consequence that an arbitration clause in a consumer contract is invalid and hence the parties have to litigate. These restrictions will be discussed in detail in a later Chapter.³⁴⁰ However, if the arbitration clause is valid and the dispute arbitrable, the question arises whether an arbitration tribunal would apply the specific mandatory laws contained in Article 5 of the Rome Convention. If the tribunal chooses to determine applicable law according to the conflict of law rules of a Contracting State to the Rome Convention³⁴¹, the answer to this question is positive. Article 5 (2) of the Rome Convention provides that the mandatory consumer protection law of the country of the consumer's residence applies if the contract was preceded by advertising or a specific invitation in the consumer's country of residence and the consumer took the steps to conclude the contract there. It has already been shown that this provision would apply to internet contracts.

4.5.4 Conflict of law rule on mandatory laws for internet disputes

For the Model³⁴² it is argued here that mandatory rules should be applied, on a similar basis as in Article 5 (2) of the Rome Convention, but modified in three respects:

First, the concept of mandatory laws as expressed in Article 5 of the Rome Convention is unsatisfactory. If the contract contains an express choice of law other

sparingly, see for example the Swiss Federal Supreme Court Decision BGE 120 II 155 (1994)-see also 6-2.6 and 6-7. This consideration of course only applies if there is a conflict between the applicable law and the mandatory law at the seat or at the place of enforcement, it does not apply if the conflict arises with another state, such as the consumer's residence. N Voser fn 319 335

³⁴⁰ 7-2

³⁴¹ As has been pointed out above, tribunals have a power of discretion in this matter. If the tribunal applies the conflict of law rules of a state who is not a party to the Rome Convention, or applies transnational rules directly, Art.5 (2) Rome Convention obviously does not apply.

³⁴² 8-3.1

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than the law of the consumer's residence, Article 5 (2) of the Rome Convention envisages that a mix of the chosen law and the consumer's law applies- the consumer's law to the extent that it is mandatory and the chosen law for the issues, where the consumer's law is non-mandatory. If the contract does not contain a choice of law, Article 5 (3) provides that the consumer's law shall govern all aspects. It would be simpler and clearer to provide, whether or not the contract contains a choice of law that the law of the consumer's residence should apply to all aspects of the dispute *if* the contract is a relevant consumer contract.³⁴³

Secondly, the business to consumer relationship paradigm is unsatisfactory and should be extended to incorporated entity-individual relationships. In other words the conflict of law rules should not be limited to disputes between business and consumers, but should apply where there is an internet dispute between a corporate entity and an individual. This will not be discussed any further, as this argument has already been made in Chapter Three.³⁴⁴

An important distinction has to be made here between (i) the relevant connection of the mandatory law to the situation of the dispute and (ii) the scope of the mandatory law itself. The connection is essentially the conflicts of law rule stating in what circumstances the mandatory law overrules the otherwise applicable law, essentially the trigger for the application of the mandatory law (such as the circumstances described in Article 5 (2) of the Rome Convention). The scope of the mandatory law is the provision or definition in the mandatory law itself describing when it is applicable, such as the definition as to who is a 'consumer' in a consumer protection law. For a mandatory law to be applicable, it has to pass two gateways, the conditions for applicability under the conflicts of law rule and the conditions of the mandatory law itself. Since this thesis is not concerned with substantive matters, it only examines the former.

³⁴³ See Art.5 (1) EU Commission Proposal for a Regulation on the law applicable to contractual obligations (Rome I) COM(2005) 650 of 15. December 2005

³⁴⁴ 3-6.3

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Thirdly the wording concerning the relevant connecting factors in Article 5 (2) is unclear in its application to internet disputes and should be improved in the proposed conflicts of law rule modelled on that Article.

First of all, if, on an objective assessment of the online activity (such as selling goods or services on a website), this is targeted at a particular location, the mandatory laws of that jurisdiction should *prima facie* apply.

But additionally, the issue is essentially one of fair risk allocation. On the one hand it could be argued that an incorporated entity actively seeking to enter into contracts with individuals in foreign jurisdictions via the internet should comply with the mandatory laws applying to these individuals at their place of residence and that the cost of this compliance is a concomitant factor to directing commercial activities abroad.

However, corporate entities are legitimately concerned about how to limit the risk of being prosecuted or sued for not complying with the laws of numerous jurisdictions when using a communications medium that is essentially global. One way of limiting this risk would be to target only those jurisdictions with whose laws a corporate entity wishes to comply and therefore the issue is how to identify its individual clients' location. As has been discussed in Chapter Three³⁴⁵, establishing the location of a person communicating via the internet with certainty is a difficult and expensive (albeit not insurmountable) task. Hence to impose a burden on the corporate entity to establish the location of its individual customers with certainty would be too harsh.

Therefore secondly it should be stipulated that the corporate entity may take some measures towards establishing the location of its customers by simply asking the customer to identify his or her location. If the customer then misleads the corporate

³⁴⁵ 3-2.2

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entity as to location, he or she should lose the protection of the mandatory laws at the customer's location and the law of the corporate entity should apply.³⁴⁶

Therefore a corporate entity can protect itself by enquiring about a customer's location before the transaction is completed and the mandatory law of the individual customer's residence should apply, if the corporate entity has directed its activities to that state, unless the customer has misled the corporate entity about his or her location.³⁴⁷ Such a conflict of law rule has the advantage that the customer's location is made transparent with simple means and protects the trader from unwittingly contracting with an individual in a jurisdiction it is trying to avoid.

5. Conclusion

This Chapter provides the background for the argument that a variant of arbitration, *ie* online arbitration should be considered to be the main *binding* form of dispute resolution for internet disputes.

This Chapter has looked at the two main forms of ADR, mediation and arbitration and explained their function and significance. Mediation, being a voluntary, non-coercive form of dispute resolution, based on consensus between the parties and not leading to a directly enforceable result, cannot be regarded as a true replacement for adjudication. It has also been shown that the nature of mediation is entirely different from that of adjudication. It has been explained that mediation is based on negotiation and compromise, rather than a decision on rights and entitlements. Therefore, it has been argued that mediation is only fair if the parties have access to adjudication, as otherwise a compromise may be based on a party's desperation rather than a consideration of the merits of a case. This argument does not detract

³⁴⁶ The question could be asked whether the law of the falsely stated location should apply as this would accord with the expectation of the corporate entity. The argument against this is that that law has no real connection with the contract.

³⁴⁷ Similar: Art.5 (2) EU Commission Proposal for a Regulation on the law applicable to contractual obligations (Rome I) COM(2005) 650 of 15. December 2005

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from the significance of mediation as an important method to filter out disputes lending themselves to a compromise. Hence mediation should always be attempted.

Having singled out arbitration as the primary form of *binding* dispute resolution for internet disputes, this Chapter also had to deal with applicable law. Since arbitration is adjudication based on law, in cross-border internet disputes it is necessary to determine the applicable law. This Chapter has shown that arbitration tribunals have adopted a more flexible approach to this issue, in particular by relying on notions such as *Lex Mercatoria*. However, this approach is not suitable where the application of a foreign law or mercantile rules would deprive the individual as the weaker party of the protection of national mandatory laws, such as consumer protection laws.

This Chapter therefore argues that mandatory laws valid at the location of the individual should be adopted by the schemes of online arbitration which are part of the Model outlined in Chapter Eight, if the corporate entity has directed its activities to that jurisdiction, unless the individual has misled as to his or her location.

The next step in the progression of the thesis is to show how technology can be used to transform ADR into ODR.

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*I have a spelling checker
It came with my PC;
It plainly marks for my revue
Mistakes I cannot see.
I've run this poem threw it,
I'm sure your pleased too no,
Its letter perfect in it's weigh,
My checker tolled me sew.*

(Janet Minor, US poet)

1. Introduction

This Chapter looks at online forms of mediation and arbitration and variants of the main forms of ADR and how they have been transformed by ODR. This Chapter essentially focuses on the online dimension of extrajudicial dispute resolution defining the meaning of the phrase 'online dispute resolution' and its significance for the fair resolution of internet disputes. This Chapter explains the different forms of ODR and the technology currently being used or developed for dispute resolution.³⁴⁸ Its main argument is that ODR is more than mere online ADR. The technology has a transforming effect- it makes dispute resolution for internet disputes more efficient and hence more accessible, thus contributing to fairness.³⁴⁹

³⁴⁸ This Chapter does *not* contain an in-depth analysis, based on original research of what different forms of technology such as artificial intelligence, expert systems, processing systems and communication applications can achieve for ODR- this would be the subject of a PhD dissertation in its own right.

³⁴⁹ 2-2.3.1

2. Definition of ODR

The adjective 'online' refers to the use of computer and internet technology, best described by the phrase information and communications technology (ICT).³⁵⁰

ODR is therefore dispute resolution carried out combining the information processing powers of computers with the networked communication facilities of the internet. For the purposes of this thesis the following simple and short definition is proposed: 'ODR is a collective noun for dispute resolution techniques outside the courts using information and communication technologies (ICT), and in particular internet applications.'

The benefits of using such technology is crucial to the understanding of the significance of ODR so that the technology has been described by the metaphor of the 'Fourth Party',³⁵¹.

The phrase 'ODR' as used in this thesis encompasses processes which are conducted completely online, without the parties ever meeting face-to-face, as well as processes which are only partly online.³⁵² ODR is based on variations of mediation and arbitration, as described in the previous Chapter, but new and innovative variants have developed, as will be seen in the next Section.

³⁵⁰ C Soanes, A Stevenson (eds.) *Concise Oxford English Dictionary* (11th edition Oxford University Press 2004) defines 'online' as 'controlled by or connected to a computer' or as 'available on or carried out via the internet'; D Ince *Dictionary of the Internet* (Oxford University Press 2001) defines 'online' as 'when a computer or user is directly connected into a network and is capable of interacting with it, for example by querying the contents of a database'.

³⁵¹ E Katsh *Online Dispute Resolution* (Jossey-Bass San Francisco 2001) 93

³⁵² ABA Task Force on Electronic Commerce and Alternative Dispute Resolution, Final Report August 2002, as updated on 28. October 2002 on file with author; M Conley-Tyler 'One Hundred and Fifteen and Counting: The State of Online Dispute Resolution 2004' in M Conley Tyler, E Katsh, D Choi (Eds.) *Proceedings of the Third Annual Forum on Online Dispute Resolution 2004* available from <http://www.odr.info/cyberweek2004_library.php> [14. September 2007]; L-E Teitz 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of Online Dispute Resolution' (2001) 70 *Fordham Law Review* 985-1016, 991; S Schiavetta 'The Relationship between e-ADR and Art.6 European Convention of Human Rights pursuant to the case law of the European Court of Human Rights' [2004] *Journal of Information Law and Technology* Issue 1

3. Forms of ODR

3.1 Brief overview

The first experiments in extra-judicial ODR were made during 1996/1997 in the US and Canada.³⁵³ Most of these were initially university projects evolving into commercial ventures. The European Commission and national governments in Europe and beyond have strongly advocated the use of ODR systems for consumer disputes.³⁵⁴ While this is a continuously developing field, ODR is far from merely a theoretical concept- it is already relevant to dispute resolution practice. *Melissa Conley Tyler* in her survey in July 2004 counted 115 ODR services worldwide.³⁵⁵

Traditional offline arbitration and mediation institutions³⁵⁶ have been focusing on the possibilities raised by online technology. Furthermore, some statutory dispute resolution schemes have been established, which use ODR.³⁵⁷ Recent years have

³⁵³ Virtual Magistrate (arbitration, Chicago-Kent College of Law), see www.vmag.org [14. September 2007], the Online Ombuds Office (mediation, University of Massachusetts) out of which eventually developed the Squaretrade venture, see www.squaretrade.com [14. September 2007] and the Cybertribunal (University of Montreal), out of which later developed E-Resolution, a commercial venture, albeit well-known, ceased operations in December 2001

³⁵⁴ Art.17 E-commerce Directive 2000/31/EC of 8. June 2000; the European Commission has funded a consumer mediation project called ECODIR, see www.ecodir.org [14. September 2007]; see also s. B OECD Guidelines for Consumer Protection in the Context of Electronic Commerce of 9. December 1999 available from http://www.oecd.org/document/51/0,2340,en_2649_34267_1824435_1_1_1_1,00.html [14. September 2007]; see the documentation regarding the workshop organized by the US FTC and DOC in June 2000 Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace available from <http://www.ftc.gov/os/2000/02/altdisputeresolutionfrm.htm> [14. September 2007]; a good overview of early private and public initiatives in this field is provided by A Wiener 'Regulations and Standards for Online Dispute Resolution' dated 15. February 2001 (on file with author) available from <http://www.mediate.com/articles/awiener4.cfm> [14. September 2007]

³⁵⁵ M Conley-Tyler fn 352

³⁵⁶ ICC Court of Arbitration's online filing platform 'NetCase' at https://www.iccnetscase.org/Netcase/pdf/Pamphlet_En.pdf, the Electronic Case Facility (ECAF) of the WIPO Mediation and Arbitration Center <http://www.wipo.int/amc/en/ecaf/index.html> and the AAA's online filing platform, WebFile <https://apps.adr.org/webfile/>; Consensus Mediation's e-Mediator scheme <http://www.consensusmediation.co.uk/e-mediator.html>; the ADR Group's online mediation platform <http://www.adrgroup.co.uk/online-dispute/online-dispute-res.htm> [14. September 2007]

³⁵⁷ See for example the Communications and Internet Services Adjudication Scheme (CIAS). for disputes between communication service providers and their customers. 8-2.2.1; Office of the Telecommunications Ombudsman (Otelco), also discussed in 8-2.2.1 <http://www.otelco.org.uk/content.php?pageID=100>; the Financial Ombudsman Service, also discussed in Chapter 8, <http://www.financial-ombudsman.org.uk> [14. September 2007]

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also seen some amount of private entrepreneurial activity in the ODR field³⁵⁸, albeit with mixed results, only some of which seem to have established a viable business model in the long run.³⁵⁹

3.2 Case-study: Austrian Internet Ombudsmann

An interesting project in the ODR context is the Austrian Internet Ombudsmann³⁶⁰ founded in 1999. Consumers can bring disputes against business³⁶¹, arising from e-commerce before this ombudsman service. Only consumers can make a complaint and initiate the procedure, but not businesses.³⁶²

The Internet Ombudsmann service has worked on 4750 complaints in 2006, with the total of claims amounting to Euro 609000 (about £ 412969).³⁶³ This equals an average claim of Euro 128 (about £ 87). Hence this ombudsman scheme covers mainly small claims.

The procedure is a two step procedure, consisting of online mediation and an online recommendation. At the first stage the Ombudsmann mediates between the parties. If this does not lead to a settlement and if both parties agree to a second stage, the Ombudsmann makes a recommendation.³⁶⁴ The process uses an online platform and electronic file.³⁶⁵

³⁵⁸ Squaretrade <http://www.squaretrade.com/cnt/jsp/index.jsp> ; Cybersettle <http://www.cybersettle.com/info/about/company/overview.aspx> ; i-courthouse <http://www.i-courthouse.com/main.taf?&redir=0> [14. September 2007]

³⁵⁹ M Conley-Tyler fn 352 Appendix 3: two prominent providers Online Resolution (<http://onlineresolution.com>) and eResolution (see http://www.theregister.co.uk/2001/12/04/eresolution_quits_domain_arbitration) [14. September 2007] ceased operation in 2003 and 2001 respectively.

³⁶⁰ <http://www.ombudsmann.at> ; This project has been copied in Germany in 2003 under www.ombudsman.de , see <http://www.ecin.de/news/2003/12/09/06515> [14. September 2007]

³⁶¹ The Internet Ombudsmann offers conciliation services only for C2C disputes.

³⁶² http://www.ombudsmann.at/ombudsmann.php_cat/21/title/H%E4ufige+Fragen [14. September 2007]

³⁶³ http://www.ombudsmann.at/ombudsmann.php_cat/3/title/News [14. September 2007]

³⁶⁴ Confirmed by email by the Austrian Ombudsman (on file with author)

³⁶⁵ http://www.ombudsmann.at/ombudsmann.php_cat/21/title/H%E4ufige+Fragen [14. September 2007]

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The Austrian ombudsman service is not mandatory. Consumers can choose it by initiating a claim. The company against whom a claim is made is asked whether or not it wishes to participate in the procedure. Some companies may have agreed to take part before the dispute by signing up to the Eurolabel Code of Conduct and trust mark scheme³⁶⁶. This does not make online arbitration generally obligatory, but, for a business who has opted to become a member of Eurolabel before the dispute arose and who has been certified in Austria, requires participation in the Internet Ombudsmann procedure.³⁶⁷ Such a business would have to accept a recommendation made by the Internet Ombudsmann service at the second stage of the procedure.³⁶⁸

For other companies participation is based on voluntary agreement after the dispute has arisen. However, the Internet Ombudsmann publishes the names of companies, against whom multiple complaints have been made and who have consistently refused to take part in dispute resolution, on its website.³⁶⁹ Furthermore, the procedure will only continue to the second stage if both parties agree to this. In particular, the ombudsman only makes a recommendation if both parties agree to this.³⁷⁰

As to the jurisdiction of the Internet Ombudsmann, this is only available to consumers who are resident in Austria who complain against a business which is established within an EU Member State.³⁷¹

The ombudsman service is free for the user, both the consumer and the company concerned. The parties only have to pay their own costs (if any). The parties may

³⁶⁶ <http://www.euro-label.com> [14. September 2007]; 8-2.1.3

³⁶⁷ <http://www.ombudsmann.at/ombudsmann.php/cat/21/aid/59/title/Wie+loft+das+Streitschlichtungsv erfahren+beim+Internet+Ombudsmann+ab%3F> and <http://www.guetezeichen.at> [14. September 2007]

³⁶⁸ <http://www.guetezeichen.at> [14. September 2007]; Para. 16 (3) Verfahrensrichtlinien (Procedural Rules) available from <http://www.guetezeichen.at/kriterien/Verfahrensrichtlinien.pdf> [14. September 2007]; the Internet Ombudsmann had 127 Eurolabel cases in 2006,

³⁶⁹ <http://www.ombudsmann.at/ombudsmann.php/cat/21/title/Hufige+Fragen> [14. September 2007]

³⁷⁰ *ibid*

³⁷¹ *ibid*; confirmed by email by the Austrian Ombudsman (on file with author)

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have legal representation, but this is not required, as the Internet Ombudsmann gives guidance to the parties during the procedure.³⁷² The costs of the Internet Ombudsmann are born by Austrian public funds, through the Austrian Institute for Applied Telecommunication³⁷³, the Federal Ministry for Social Services and Consumer Protection³⁷⁴ and the Federal Work Commission^{375 376}.

The Austrian Internet Ombudsmann is an example of a current application of ODR for internet disputes. The final Chapter of this thesis will draw some lessons from this scheme. However it should also be pointed out that, in some ways the Model based on the discussions in this thesis and outlined in Chapter Eight is quite different.³⁷⁷

4. Technologies Used

This section briefly describes the technologies used in online mediation and online arbitration.

4.1 Online Mediation³⁷⁸

As has been described in the previous Chapter³⁷⁹ mediation consists of a neutral third party brokering a settlement between the disputants. For this, communication between the mediator and each party and between the parties is obviously crucial. In Online Mediation the mediator assists the parties in negotiating their dispute

³⁷² *ibid*

³⁷³ Österreichisches Institut für Angewandte Telekommunikation (ÖIAT)

³⁷⁴ Bundesministerium für Soziales und Konsumentenschutz (BMSK)

³⁷⁵ Bundesarbeitskammer

³⁷⁶ *Ibid*; It has also received funding from the European Commission and the Austrian Internet Privatstiftung

³⁷⁷ The Austrian Internet Ombudsmann is not compulsory and it seems to cover small consumer claims. This thesis is concerned with a wider range of disputes and power imbalances which goes beyond small consumer claims.

³⁷⁸ <http://www.consensusmediation.co.uk/e-mediator.html> or

<http://www.conciliaonline.net/concilia/default.asp?idtema=4> [14. September 2007]

³⁷⁹ 4-3.1

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using electronic communication such as email or specially designed websites providing virtual rooms in which the parties can communicate online.³⁸⁰

Email can provide a fast, easy to use, readily available and convenient method of communication and negotiation. Email can be supplemented by other means of communication such as instant messaging, the telephone and face-to-face meetings.

Intelligent filing forms, 'dynamic forms' on the web utilize the experience accumulated on particular types of disputes and allow the parties to file the statement of case and defence online. Such online forms are ordinarily easier to complete than offline forms as they change depending on the information entered. For example if the claimant classifies the type of dispute as 'non-delivery of goods', the questions the form asks are tailored to this particular type of dispute.³⁸¹

Alternatively or additionally, the parties and the mediator may use an online platform.³⁸² This is a computer linked to the internet hosting a set of linked pages containing instructions and information. Such an online platform is interactive, it allows the parties to post material, to view postings and to respond to postings. The online platform may contain various technologies allowing for written communication and discussions, as well as voice or video-conferencing.

One such technology is online chat, consisting of users exchanging written text messages, all in the same space of time. In online chat the parties immediately respond to each other's messages (synchronous discussion). By contrast threaded discussion boards are asynchronous- in other words there is a time lapse between the posting and reply. There is no requirement that the users are online at the same

³⁸⁰ L Ponte, T Cavenagh *Cyberjustice* (Pearson Prentice Hall New Jersey 2005) 63

³⁸¹ See for example the Squaretrade form

https://www.squaretrade.com/odr/jsp/fil/filing_start_a.jsp?vhostid=tomcat4&stmp=squaretrade&cntid=fom8by9mdl or the AAA's WebFile <https://apps.adr.org/webcase2/index.jsp> or the form used by OTELO <http://oteloapp.otelo.org.uk/tkwebflow/flow.aspx?f=OtelointernetComplaint&template=otelowebtpl&xsl=Otelowebdtree> [14. September 2007]

³⁸² Platform used by the ADR Group <http://www.adrgroup.co.uk/online-dispute> online-dispute-res.htm [14. September 2007]

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time. As the name implies in *threaded* discussion boards the comments and replies are organised under headings and subheadings, which makes it easier to follow the flow of the discussion.

Furthermore it is possible to segment the online platform into spaces, such that Space A is only accessible to one party and the mediator, Space B is only accessible to the other party and the mediator and Space C is accessible to both parties and the mediator. Space A and B could be used for virtual private caucuses and Space C for public discussions. In this way the platform can be used to replicate the traditional three- room procedure by virtual meetings on an online platform. The mediator and the parties in an online mediation can be simultaneously in space C and A/B, thus being in a joint meeting and caucus at the same time. This would be impossible in real-world, offline mediation.³⁸³

Another obvious advantage of such virtual meetings is that they can be held at a distance, obviating the need to travel and if the meetings are held asynchronously, whenever the participant in the mediation has a convenient moment.

The disadvantage of a virtual meeting is that the meeting is deprived of non-verbal communication such as postures, gestures, facial expressions and tonality of voice. It is often said that the lack of non-verbal communication makes it harder for the mediator to establish the parties' trust and confidence in the procedure.³⁸⁴ However, this disadvantage must be balanced against the opportunities computer communication offers.³⁸⁵

³⁸³ C Rule *Online Dispute Resolution* (Jossey-Bass San Francisco 2002) 72

³⁸⁴ G Kaufmann-Kohler, T Schultz fn 224 23; C Rule fn 383 66-67; L Gibbons, R Kennedy, J Gibbs 'Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message' (2002) 32 *New Mexico Law Review* 27-72, 43; H-J Fietkau argues that face to face communication is a complex process which cannot be satisfactorily reproduced in textual communication. see his chapter 'Unscharfe Kommunikation und verzerrte Entscheidungen in der Online Mediation' in O Märker, M Trénel *Online Mediation* (Edition Sigma Berlin 2003) 82-104, 89-90

³⁸⁵ R Gordon 'The Electronic Personality and Digital Self' [February/April 2001] *Dispute Resolution Journal* 8-19; G Kaufmann-Kohler, T Schultz fn 224 23 and C Rule 383 66-67- better reflection, less provocation and intimidation through distance; L Gibbons et al fn 384 43

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Computer aided communication is not limited to text and words but can be enhanced by other forms of visual expression such as the imaginative use of images, graphics, shapes and symbols. For example as a means of encouragement colourful graphics could illustrate to the parties the progress they have made in their rapprochement. Symbols and colours could be used to represent emotions. Thus, face-to-face communication is replaced by 'screen-to-screen' communication. This however requires mediators to adapt their communication skills from face-to-face interaction to screen-to-screen interaction.³⁸⁶

Finally, translation software³⁸⁷ supports the translation of documents, an important factor in international, multilingual disputes.

4.2 Automated Negotiation-Negotiation Assistance

Another useful ODR mechanism, which can be deployed in conjunction with online mediation, is negotiation software assisting the parties in refining their interests. An example for this is the *Smartsettle* software³⁸⁸, which, with the help of a mediator, allows users to analyse their bargaining positions by evaluating and prioritising their negotiation objectives and calculating (through an algorithm) the outcome most efficient for *all* parties.

The procedure has been influenced by modern negotiation theory moving away from position bargaining towards principled negotiation based on each party's underlying interests, discussed in the preceding Chapter³⁸⁹. *Ernest Thiessen* has

³⁸⁶ E Katsh *Online Dispute Resolution* (Jossey-Bass San Francisco 2001) 132-134

³⁸⁷ An example for a free translation software can be found at <http://babelfish.altavista.com/tr> [14. September 2007]

³⁸⁸ <http://www.smartsettle.com> [14. September 2007]

³⁸⁹ 4-3

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described this procedure as ‘working towards the goal of Pareto efficiency³⁹⁰ in negotiation’.³⁹¹

The parties at first each state their initial positions (without making demands) and identify the underlying interests. From this, the software lists all issues whether qualitative or quantitative in a neutral manner. The mediator then helps the parties to further refine their underlying interests, priorities and the relative importance of each issue, as well as such matters as what they would expect from litigation (in other words their best alternative to a negotiated agreement³⁹²). If the parties wish, this information can be maintained confidential and will not be disclosed to the other side. The software then generates various packages, trading off the various issues against each other, calculating the most efficient allocation of interests on the different issues. In this way, it is claimed, the most efficient solution can be found.³⁹³

4.3 Automated Negotiation-Blind Bidding³⁹⁴

A second form of automated negotiation is blind bidding, which can also be used in conjunction with online mediation. Automated settlement systems are a highly innovative form of ODR, suitable for settling monetary claims³⁹⁵ (*ie* where liability is not disputed, but only the amount of damages payable). The process involves the parties making successive blind bids, which are entered into a form on a secure website. ‘Blind’ means here that the bids are not disclosed to the other party, hence offers and demands remain confidential not prejudicing future negotiations.³⁹⁶ Once

³⁹⁰ In other words the goal of finding an optimal solution, in which the gains of neither party can be increased any further without taking from the other

³⁹¹ E Thiessen, J McMahon, ‘Beyond Win-Win in Cyberspace’ (2000) 15 *Ohio State Journal on Dispute Resolution* 643-667, 666

³⁹² 4-3.1

³⁹³ E Bellucci, J Zeleznikov, A Lodder ‘Integrating artificial intelligence, argumentation and game theory to develop an Online Dispute Resolution environment’ *Proceedings of the 16th IEEE International Conference* (2004) available from <http://pubs.cli.vu/pub208.php> [14. September 2007]

³⁹⁴ Cybersettle <http://www.cybersettle.com/info/main.aspx> [14. September 2007]

³⁹⁵ G Kaufmann-Kohler, T Schultz fn 224 19

³⁹⁶ L Ponte, T Cavenagh fn 380 44

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the bids are within a certain range of each other, settlement will automatically be reached, for the median amount. The process is driven by software so that no human third party is directly involved and is therefore particularly cost-effective. The software keeps offers confidential until they come within the range. Communication applications such as email and web-based platforms support the settlement process. Such software can assist in avoiding posturing and conflicts ‘over the last few pennies’.³⁹⁷

4.4 Online Juries/Mock Trials³⁹⁸

Online summary jury trials or mock trials are an ODR mechanism, whereby a jury of peers makes a non-binding determination of the issues via a website. The parties upload their respective pleadings and evidence onto the site and the ‘jurors’ can ask questions and render an online verdict, recommending how the dispute should be solved. The neutral third party is replaced by a number of volunteering internet users acting as if they were jury in a truncated civil court trial by posting their questions and verdicts onto the website. This ODR mechanism assists the parties in their negotiations for a settlement by reality testing their positions against the supposed common sense of the volunteers forming ‘the jury’. The mock jury is claimed to reflect the likely behaviour of a real jury and takes into account the US constitutional preference for jury trials in civil cases.³⁹⁹

4.5 Online Arbitration

Online arbitration replicates the offline, traditional fact-finding and decision-making processes which are constituent of arbitration online by using ICT for communication and information processing.

³⁹⁷ C Rule fn 383 61

³⁹⁸ Example: www.i-courthouse.com [14. September 2007]

³⁹⁹ H Brown, A Marriott fn 121 371 (mock trials)

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Currently widespread is the exchange of electronic documents on a CD-Rom, allowing for an (almost) paperless hearing. It should be noted that there are some limitations to this technique. While any manuscript document can be turned into a photographic image, some information and evidence may be lost in the process. Furthermore the technology of scanning-in or Optical Character Recognition (OCR) is only about 90% accurate and therefore not (yet) perfect.⁴⁰⁰

One extremely useful online information processing technique for arbitration is electronic file management, especially for complex, large-scale arbitration. Electronic file management means that all documents pertaining to the case in question are stored electronically in a systematic order. Electronic file management software permits individual documents or passages to be easily retrieved, displayed or printed, browsed, cross-referenced, compared, annotated and searched for keywords. Electronic file management reduces the time wasted searching for documents and it avoids the carrying of large amounts of paper. Cross-referencing allows the linking of text, e.g. in the pleadings, to evidence or law. It may also be combined with diary management functions such as automatically sending out notices of filing deadlines and integrated with word-processing functions, so that the database generates procedural documents, notices etc.

Electronic file management is already widely used in practice, whether it is only used internally by the dispute resolution institution or also externally accessed by the parties and arbitrators via an online platform, described in the next paragraph.

⁴⁰⁰ S Tanner, 'Deciding whether Optical Character Recognition is Feasible' Research Paper, Oxford Digital Library http://www.odl.ox.ac.uk/papers/OCRFeasibility_final.pdf [14. September 2007]

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In terms of online techniques the next step forward is an online platform⁴⁰¹, which is normally combined with electronic file management. This allows the parties and arbitrators to upload documents directly onto a structured website, using a unified filing system, via a secure connection.⁴⁰² An online platform is a website for document management creating one central, unified case database, which allows the parties, the arbitrators and the administrator to upload, view, browse, search and retrieve documents.⁴⁰³ The platform may also contain an electronic diary and an electronic secretariat, which automatically records the filing of documents and automatically at the required date sends out certain standard documents, such as acknowledgements, receipts or certain notices. Furthermore the online platform can additionally allow for electronic payment of arbitration fees by credit card. However online filing may entail security risks and precautions must be taken against unauthorised access.⁴⁰⁴

In this context it is interesting to look at the results of a user survey conducted by the AAA in 2004. They asked the users of their online filing platform, WebFile for what purposes they used the WebFile, the result was that only 16.2% of users completed the entire arbitration process online.⁴⁰⁵ This may indicate that users do not entirely trust or are not entirely familiar with online platforms as yet. However 61% of users said that if the other party suggested using the online platform, they would in principle agree to use it for some part of the procedure.⁴⁰⁶

⁴⁰¹ ICC Court of Arbitration's online filing platform 'NetCase' at https://www.iccnetscase.org/Netcase/pdf/Pamphlet_En.pdf, Electronic Case Facility (ECAF), WIPO Mediation and Arbitration Center <http://www.wipo.int/amc/en/ecaf/index.html> and the AAA's online filing platform, WebFile <https://apps.adr.org/webcase2/demo/index.htm>, online filing platform for .eu disputes, http://www.adreu.eurid.eu/arbitration_platform/overview/index.php; Online filing platforms for mediation, see Consensus Mediation's e-Mediator scheme, <http://www.consensusmediation.co.uk/e-mediator.html>; the ADR Group's platform: <http://www.adrgroup.co.uk/online-dispute/online-dispute-res.htm> [14. September 2007]

⁴⁰² M Philippe "NetCase: A New ICC Arbitration Facility" *ICC International Court of Arbitration Bulletin* Special Supplement 2004 53-61, 54

⁴⁰³ *ibid*

⁴⁰⁴ Such as encryption for transmission, passwords for authentication, virus protection and firewalls. If these protections are taken, online platforms are safer than unprotected email, see M Philippe fn 402 54

⁴⁰⁵ *Debi Miller-Moore* presentation- Joint Conference CCLS Queen Mary University of London and Chartered Institute of Arbitrators, London 6. September 2004

⁴⁰⁶ *ibid*

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Concerning communication applications for online arbitration, interactive synchronous discussion applications such as instant messaging and online chat can be used. However relying on purely text-based communication has significant disadvantages for the reality of the communication, such as the assessment of non-verbal cues such as body language, which has already been discussed in relation to mediation above. This is particularly significant for the cross-examination of witnesses and the assessment of a witness' credibility.

Instead, means of visual distance communication such as web video-conferencing may be used to replace traditional face-to-face hearings. The great advantage of video-conferencing is that witnesses, parties and arbitrators do not need to travel, reducing time wasted and cost. On the other hand, the issue is to what extent it is possible for the tribunal to assess the credibility of a witness giving testimony per video-link. This depends to a large extent on the quality of technology used.

This means in particular that the connection avoids delays and interruptions and that the witness can be clearly seen and heard. The physical demeanour and tone of voice should be easily detectable to assess the credibility of the witness. For example, it might not be apparent if a witness blushes because the colour resolution of the monitor is not sufficient. Therefore, the hardware used should be suitable and the connection should be of sufficient capacity.⁴⁰⁷ Also it may be difficult to make direct eye contact as the camera and the displaying screen are not in the same place.⁴⁰⁸

It is sometimes discussed to what extent a witness giving oral, filmed testimony can be manipulated- for example it could be that there is someone prompting or coaching the witness what to say. This person would stand in front of the witness not being captured by the camera directed at the witness. In order to avoid a coaching of the witness, the picture should cover the whole room at the witness end,

⁴⁰⁷ a dedicated link or broadband might not be available in all countries

⁴⁰⁸ L. Gibbons et al fn 384 34

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which necessitates at least two cameras. And there is the issue of identification of the witness. Therefore most weight can be given to evidence per video-link if both parties are represented or if a member of the tribunal is present at either end of the link. However this might not always be possible. Alternatively a trusted third party such as a law firm, an arbitral institution, a notary or a court could be used.

It is now fairly common in adjudicative proceedings to examine and cross-examine a witness by two-way video link, for example, where it is impractical for the witness to travel to a hearing venue. This allows the evidence to be given directly to the tribunal without the witness having to travel far. Also the rules of civil procedure, for example in England and Wales and the US, allow for this under certain circumstances.⁴⁰⁹

In addition to seeing the faces of the persons communicating, evidence may have to be visually presented. Such a functionality may be provided by shared collaborative workspaces- these are online communication applications which do not only allow the parties and the arbitrator to communicate through synchronous chat and see each other through web-video conferencing, but in addition provide a facility to share visual information by displaying and manipulating a graphic interface, where a multitude of people see the same objects roughly simultaneously.⁴¹⁰ This could be a 3D image of an object which can be rotated or zoomed in and out by each participant in turn, or it could be a drawing board used for graphical illustration. It can be used, for example to enable the participants to view pieces of evidence or illustrate an argument. Since arbitration is based on the establishment of facts, shared collaborative workspaces can be important for each party explaining,

⁴⁰⁹ CPR Part 32, rule 32.3 or PD 32 Annex 3 by leave of the Court, it is pointed out however that evidence by video-link may be of a lesser quality and that hence convenience and fairness should be balanced, see PD 32 Annex 3 para 2. In *Polanski v Condé Nast Publications* [2005] HRLR 11(HL) the House of Lords restored an order allowing the claimant to give evidence by means of a video link from France. The Court argued that evidence given by video-conferencing can be tested adequately (per Lord Nicholls para 14 and para 27: 'seeking a VCF order is not an indulgence'). See also the US Federal Rules of Civil Procedure: Fed.R.Civ.P. 43 (a)

⁴¹⁰ D Protopsaltou, T Schultz, N Magnenat-Thalmann 'Taking the Fourth Party Further? Considering a Shared Virtual Workspace for Arbitration' (2006) 15 (2) *Information & Communications Technology Law* 157-173, 160-162, 165

arguing and illustrating their case. The use of collaborative workspaces in arbitration increases understanding of factual issues and thereby makes the process quicker and more efficient.⁴¹¹

5. Transformative Power of ODR

As the preceding discussion has shown, ODR is derived from and based on variants of the two main forms of ADR, *ie* mediation and arbitration. From a superficial point of view, it may seem that different forms of ODR are mere transplants of ADR into the online environment, in other words, ODR replicates ADR online. This superficial observation is fallacious in the same way as an argument that, for all forms of motorised transport, the horse that drew the cart has merely been replaced by an engine, but that the transportation itself has not changed. To say that ODR is merely online ADR, would similarly underestimate the transformative power of the technology.

5.1 Technology as the fourth party in ODR

Ethan Katsh and *Janet Rifkin* have expressed the critical role of technology and coined the metaphor of the ‘fourth party’:

‘The fourth party does not except in a few well-defined instances such as blind-bidding, *replace* the third party. But it can be considered to *displace* the third party in the sense that new skills, knowledge and strategies may be needed by the third party. It may not be coequal in influence to the third party neutral, but it can be an ally, collaborator, and partner. It can assume responsibilities for various communications with the parties, and the manner in which the third and fourth

⁴¹¹ *ibid* 162

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parties interact with each other will affect many parts of the dispute resolution process.⁴¹²

This expression signifies that the technologies used are not merely subordinate tools in the same way that a pen and paper pad are for recording an award or mediation settlement. The metaphor expresses that the input of the technology is not subsidiary to that of the 'third party', but that the 'fourth party' is influential in shaping the process and in assisting the parties to reach a solution of their dispute. The implication from this metaphor is that ODR is fundamentally changing the ways disputes are solved. First of all, ODR is changing the underlying ADR processes⁴¹³ and new dispute resolution mechanisms, such as blind bidding⁴¹⁴, having no equivalent in the offline world, have evolved through the use of ICT for dispute resolution. But secondly, more importantly, ODR has a transformative power. How and why this transformative power takes effect is explained in this section.

5.1.1 Overcoming distances

The use of online distance communication (email, bulletin boards, chat, web-conferencing, online collaborative workspaces etc) obviates the need for face-to-face meetings in mediation or arbitration hearings. This means that the parties, their representatives, witnesses, experts and the third parties need not travel.

Furthermore, to the extent that asynchronous communication on an online platform is used, the parties also need not meet at the same time, avoiding co-ordination of busy schedules. If documents are filed on an online platform they can be accessed from everywhere, as the internet is ubiquitous. These features of ODR overcoming

⁴¹² E Katsh, J Rifkin fn 351 93-94; the first two parties being the disputants, the third party the mediator/arbitrator

⁴¹³ Also M Philippe 'Where is Everyone Going with Online Dispute Resolution?' (2002) 2 *International Business Law Journal* 167-210, 168

⁴¹⁴ See the preceding section

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distances reduce costs and delay, making dispute resolution cheaper, quicker and more accessible.⁴¹⁵

5.1.2 Empowering communication

One aspect of ODR is improving communication in dispute resolution processes. The technology aids the understanding of what a person is alleging or explaining by visualisation (such as in collaborative workspaces) or by providing access to knowledge resources (such as legal databases and case management systems, for example hypertext linking text with legal authority or evidence). Such technologies make the speaker more effective and more persuasive and potentially lead to better outcomes, which are more firmly grounded in law and evidence.

5.1.3 Saving human labour cost

The automation of certain functions previously performed manually may lead to cost-savings and may make dispute resolution cheaper. However, technologies replacing human intelligence by artificial, computer intelligence⁴¹⁶ are limited. Evaluating complex factual evidence and applying law to such complex factual scenarios (as in arbitration) or finding a solution which satisfies the needs of both parties (as in mediation) at present still have to be performed by a trained arbitrator or mediator⁴¹⁷, whose services have to be paid by professional fees. However, artificial intelligence is used in smaller tasks such as online forms (legal expert

⁴¹⁵ G Kaufmann-Kohler, T Schultz fn 224 76; R Gordon fn 385 10-11; L Gibbons et al fn 384 42-43; E Clark et al fn 248 9

⁴¹⁶ Webopedia defines artificial intelligence as 'the branch of computer science concerned with making computers behave like humans'. Two branches of artificial intelligence are of particular relevance here: expert systems, which are designed to make decisions in real-life scenarios and natural language systems, designed to make computers understand natural, human language. R Susskind defines artificial intelligence as 'the design, development and implementation of computer systems that can perform tasks and solve problems of a sort for which human intelligence is normally thought to be required' in *Transforming the Law* (Oxford University Press 2000) 162. An examination of artificial intelligence and expert systems is outside the scope of this thesis.

⁴¹⁷ S Ross Saxer 'One Professor's Approach to Increasing Technology Use in Legal Education' (1999-2000) 6 *Richmond Journal of Law and Technology* 21-57, 35; A Lodder, J Zeleznikov 'Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three Step Model' (2005) 10 *Harvard Negotiation Law Review* 287-337, 291

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systems, where the form responds to the user's input by categorising the dispute and asking the questions relevant to the type of dispute), in automated negotiation systems (calculating the solution satisfying most interests of the parties), automated diary management functions (*e.g.* sending out notifications and registering any filings made by the parties to an arbitration), in legal research (through natural language searches) and automated translation software (but it has already been pointed out above, that automated translation is not as good as that performed by a human translator).

5.1.4 Psychological effect of online communication- dealing with negative emotions

Changing communication patterns from face-to-face to online, textual or video-conferencing communication has ramifications for its emotional effect on the parties or their representatives. It has already been pointed out⁴¹⁸ that mediators and arbitrators have experienced problems in establishing trust in ODR and that the loss of non-verbal cues in textual communication has to be compensated by different forms of graphic signs employed online.

On the other hand, distance can also have a positive effect. It has been reported from mediators' personal experience that distance leads to a cooling down of acrimonious emotions and that asynchronous communication gives the party a chance to reflect. Likewise, textual communication may give opportunities for mediators to rephrase the parties' aggressive communication, thereby preventing an escalation of the dispute and speeding up its resolution.⁴¹⁹

⁴¹⁸ 5-4.1

⁴¹⁹ C Rule fn 224 66, 72; R Gordon fn 385 10-11; L Gibbons et al fn 384 33, 43; E Clark et al fn 248 9

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Another example for the positive impact of ODR on communication patterns is the use of automated negotiation software, which prevents posturing ‘over the last few pennies’ as discussed above⁴²⁰.

5.1.5 Jurisdictional problems overcome in cross-border disputes

ODR, like ADR, being extrajudicial avoids any arguments between the parties as to which state court is competent. As has been discussed in 3-9, the determination of which court is competent can be complex, time-consuming and expensive. All of this is avoided through ODR.⁴²¹ However issues of applicable law arise nevertheless for online arbitration, but these have been discussed in the last Chapter and need not be repeated here.

5.1.6 Faster information processing

A final point is that ICT enables processing of larger amounts of information in shorter spaces of time than that carried out by human beings. Electronic document management and information retrieval systems are an example for this. Faster information processing makes dispute resolution more efficient, reducing delay and costs.

5.2 Transformative power: greater access to justice

The features of ODR discussed above have the potential to transform dispute resolution by enabling access to justice at a much greater scale. ODR improves dispute resolution processes by making them more efficient, reducing delay and costs. These characteristics are not merely incidental: if dispute resolution is cheaper and quicker, this means that persons with limited resources may have

⁴²⁰ 5-4.3

⁴²¹ E Clark fn 248 9

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access to ODR. The use of ICT in dispute resolution therefore widens access.⁴²² In other words, the transformative power of ODR is that it widens access to justice. ODR is an important breakthrough in reducing pre-existing power imbalances, as conceptualised as the third element of procedural fairness in Chapter Two⁴²³, by providing access to efficient dispute resolution for disputants with limited resources.

6. The Paradox of Low Take-up

This Chapter has briefly outlined the ODR schemes in existence and it has shown that the ODR field is varied. By way of summary, the following categories can be distinguished. First, there are dispute resolution schemes run by specific marketplaces and platforms, such as Squaretrade for the online auction provider eBay. Secondly, some successful and innovative entrepreneurial schemes in the US have been established such as automated settlement systems and mock juries. Thirdly, especially in the UK, statutory ombudsmen have been successfully established, using some elements of ODR. Fourthly, the traditional, well-established arbitration institutions have created dedicated systems and platforms for online arbitration.

While some public and private ODR schemes are operating successfully it is equally true to say that coverage is extremely patchy and in particular that for internet disputes there is only very limited coverage.⁴²⁴ Most provision of ADR and ODR is specific to a particular sector or a provider's membership in a scheme.⁴²⁵ In

⁴²² More generally in relation to IT and law by R.Susskind fn 416 158

⁴²³ 2-2.3.2

⁴²⁴ M Doyle, K Ritters and S Brooker *Seeking Resolution* Research Report published by the DTI and the National Consumer Council in January 2004 URN 03/1616. p. 1 (in respect of ADR generally) and p. 13

⁴²⁵ For example there are specific ADR schemes for consumers run by IDRS, see <http://www.idrs.ltd.uk/Business/ServiceList.asp> [14. September 2007]. See below 8-2.2.

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the UK, there is no organized, general ODR scheme, open to all internet disputes, regardless of the sector.⁴²⁶

The second issue is that take-up of (consumer) arbitration and other existing ADR schemes⁴²⁷ has been extremely low.⁴²⁸ The DTI Study of 2004 found that for most ADR schemes the number of cases was in the double digits, some have no cases at all.⁴²⁹ However, low take up of ADR schemes does not necessarily mean that there is no unsatisfied need for dispute resolution.

This state of affairs raises the ‘chicken and egg’ question of whether the low availability causes the low usage or whether the low usage causes the low availability. Empirical research would be needed to investigate the reasons for the low take up of ADR or ODR schemes. This is outside the scope of this thesis. At this point, it is only possible to speculate about the reasons for this low take up of ADR/ODR and online arbitration in particular.

Possible reasons for this low take up are the following:

First, one reason could be that claimants (and in particular consumers and individuals) and their advisors do not know about ADR. This was one of the results of the 2004 DTI Study.⁴³⁰ Given that ODR is an even more recent development it can be assumed that claimants are probably even less aware of ODR and online arbitration.⁴³¹

⁴²⁶ Central London County Court Mediation scheme and LawWorks are mentioned in M Doyle et al fn 424 55- but it is also pointed out there that the funding for such initiatives is usually short-term and access being ad hoc 60

⁴²⁷ In the UK an exception to this is the Financial Ombudsman Scheme. It reports in its 2005/2006 Annual Review that it had 700,000 enquiries and 113,000 new cases, Chairman’s Foreword, Annual Report 2005/2006 available from <http://www.financial-ombudsman.org.uk/publications/ar06/ar06-chair.htm> [14. September 2007] and the Ombudsmen schemes in the communications sector, see 8-2

⁴²⁸ M Doyle et al fn 424 61

⁴²⁹ M Doyle et al fn 424 61- 62

⁴³⁰ M Doyle et al fn 424 63; see also OECD Report ‘Consumer Dispute Resolution and Redress in the Global Marketplace’ 2006 p.23

⁴³¹ Awareness about ADR should be raised through education of users and advisors- this is not discussed here

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The second factor is frequently cited as the reason why the take-up of consumer arbitration is low: if there is no binding pre-dispute arbitration clause, the defendant is unlikely to agree to arbitration after the dispute has arisen.⁴³² Chapter Eight will discuss how the parties can be brought to arbitration.⁴³³

The third factor (which in a way causes the second one) is that the enforceability of consumer, pre-dispute arbitration clauses is restricted under EU and many national laws of EU Member States.⁴³⁴ If pre-dispute clauses were binding, businesses might see some value in incorporating them.⁴³⁵

Fourthly, while ODR may be cheaper than ADR, costs are, nevertheless, an issue for small claims. Online mediation and online arbitration both require human intervention in one form or another, which must be paid for by the parties.⁴³⁶ If the more powerful party pays and organizes the procedure this may raise problems of independence. This conflict and the issue of cost is further discussed in Chapter Eight.⁴³⁷

The fifth factor has been briefly described above in this Section and is probably more important, namely that coverage of arbitration schemes is limited to specific sectors and membership schemes. As the DTI Study of 2004 points out:

‘usage cannot be high if availability is low-although ombudsmen are cited as one of the preferred ADR processes by consumer advisers, only three consumer goods and service sectors have ombudsmen schemes’.⁴³⁸

⁴³² M Doyle fn 424 16; H Perritt ‘Dispute Resolution in Cyberspace: Demand for New Forms of ADR’ (2000) *Ohio State Journal on Dispute Resolution* 675-703, 687; Consumers International ‘Disputes in Cyberspace’ December 2000, ISBN 19023 91 31 62, p 22

⁴³³ 8-2

⁴³⁴ 7-2

⁴³⁵ 8-2

⁴³⁶ M Doyle et al fn 424 3, 63, 81

⁴³⁷ 8-3.2.2

⁴³⁸ M Doyle et al fn 424 61

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This is the reason why the Model outlined in Chapter Eight will propose an open, general scheme, not limited to a particular industry or consumer sector.⁴³⁹

Related to this first point is the sixth point, namely whether consumers (and other ‘weaker’ parties in a situation of a power imbalance) trust private ADR procedures in the same way that they trust the established and impartial state courts.⁴⁴⁰ This issue of trust is difficult to address, as it is a subjective notion. The Model discussed in Chapter Eight implements due process and transparency and hence will contribute to increase trust in online arbitration.⁴⁴¹

In summary, therefore it is possible to observe an apparent paradox when examining ADR/ODR: on the one hand there is a need for fair dispute resolution, on the other hand there is little availability and low usage. The Model for dispute resolution outlined in the final Chapter Eight will overcome these reasons, by creating trust through fair procedures, bringing the parties to arbitration and providing for a general open dispute resolution scheme.

7. Conclusion

This Chapter argues that ODR transcends traditional ADR, so that ODR is not merely online ADR. As has been seen, new forms of ODR have been developed which have no offline equivalent. More importantly, the technologies used have transformative power, which can be harnessed to increase access to justice and reduce pre-existing inequalities between the parties. In this sense ODR contributes to greater fairness in dispute resolution. This Chapter explains that ODR provides powerful technology for increasing access to justice by reducing delay and lowering costs of dispute resolution through efficiency gains, overcoming geographical

⁴³⁹ See Chapter 8

⁴⁴⁰ T Schultz ‘Does Online Dispute Resolution Need Governmental Intervention?’ (2004) 6 *North Carolina Journal of Law & Technology* 71-106, 89-92; E Clark et al fn 248 16- notes that culturally this may be more an issue in Europe than in the US

⁴⁴¹ 8-3, 8-6

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distances, solving jurisdictional issues and overcoming power imbalances. While this Chapter shows that ODR does contribute to the second (access) and third (counterpoise) principle of procedural fairness, it has to be explored to what extent ODR does comply with the first principle of due process. Since mediation has been shown to be a mere filter before adjudication the discussion of due process in the next Chapters will focus on arbitration.

Chapter 6: Arbitration and Due Process

Convenience and justice are often not on speaking terms

(Lord Atkin in General Medical Council v Spackman [1943] AC 627 (HL) 638)

1. Introduction

This thesis develops a Model for the fair resolution of internet disputes. Since online arbitration has been suggested as the most important method to solve internet disputes for the Model, the fundamental question is whether the use of online arbitration based on the structures and principles of traditional commercial arbitration is fair for these types of disputes and, to the extent that the answer to this question is ‘no’, how arbitration should be adapted for the purposes of this Model.

This Chapter concentrates on due process, which has been defined as a constituent element of fairness (alongside access and the counterpoise) in Chapter Two⁴⁴². By way of reminder, Chapter Two has posited two elements of due process, equal treatment of the parties before an adjudicator and rationality, in the sense that the adjudicator must not take into account any irrelevant or irrational considerations.

This Chapter applies these due process principles to arbitration. It starts by exploring the sources of law for due process in arbitration and examines the elements of due process, contrasting litigation and arbitration. This Chapter discusses the principles of independence and impartiality, fair hearing, transparency, the duty to give reasons and rights to judicial review or an appeal.

⁴⁴² 2-5

Chapter 6: Arbitration and Due Process

The purpose of this Chapter is to list the due process requirements for the Model. Because of the limited space, this Chapter focuses mainly on English law, using references to other jurisdictions and in particular, the US, for comparison only.⁴⁴³

2. Sources of Legal Due Process

Before the discussion can proceed it is necessary to explain the sources of law for the due process requirements. The following sources of law are relevant:

professional codes of conduct, institutional (and other arbitration) rules, national arbitration legislation, common law, constitutional and human rights standards and international conventions and standards. As can be seen, these sources are a mixture of private and public law.

Arbitration as a private dispute resolution process is largely governed by contract and by the principle of party autonomy, conferring the parties with the freedom to fashion the arbitration procedures according to their needs. Notwithstanding this important principle of party autonomy, arbitration as a dispute resolution process is also governed by ‘hard’ public law in the shape of arbitration acts, setting the framework for the procedure. The courts at the parties’ chosen seat may support and intervene in the process by rulings on the validity of the arbitration agreement, staying legal proceedings in favour of arbitration, appointing a tribunal, by rulings on subject-matter arbitrability, on the removal of an arbitrator, by compelling witnesses to attend or by allowing the challenge of an award. Furthermore, the courts at the place of enforcement may refuse enforcement of a foreign award for public policy reasons. Most states have enacted specific legislation on arbitration which defines the courts’ power in this respect. The sources of law discussed here reflect the hybrid nature of arbitration.

⁴⁴³ This chapter systematically covers English law on natural justice and show noteworthy similarities and differences of approach in other jurisdictions where appropriate, by referring to examples of legislation and cases in other jurisdictions, without claiming to paint a complete picture of the laws in other jurisdictions.

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2.1 Professional codes of conduct and contract for arbitral services

The contracts⁴⁴⁴ between the parties, the arbitration institution and the arbitrator may impose an express duty on the arbitrator to act in accordance with due process principles, *ie* to act judicially and a duty to exercise proper care and skill in carrying out his or her function.⁴⁴⁵ Furthermore an arbitrator who is also a member of a profession such as a doctor, architect, engineer, accountant or lawyer, is under an implied duty to carry out their work, including any adjudication or valuation, to professional standards. In the UK, section 13 of the Supply of Goods and Services Act 1982 implies into contracts for the supply of services a duty to carry out the service with reasonable care and skill. In measuring the reasonableness of the care and skill the courts take into account the professional standards of the service provider.⁴⁴⁶ A definition of such professional standards can be found in the regulations of the appropriate professional body. Such body may have formulated professional rules of conduct when their members are acting in the capacity of arbitrators⁴⁴⁷ - breach of such standards may entail disciplinary action against the member.⁴⁴⁸ In addition there are codes of conduct or guidelines formulated by arbitration institutions or international associations⁴⁴⁹, which may be incorporated by reference in the contract between the parties and the arbitrator or, at a minimum, as in the case of the IBA Guidelines, impose moral and ethical duties on arbitrators. These codes are referred to where relevant.

⁴⁴⁴ A precise analysis of the relationship between these contracts is beyond the scope of this dissertation.

⁴⁴⁵ A Redfern, M Hunter fn 270 284-285, 291

⁴⁴⁶ *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 (HL), deciding that an accountant could be liable for a negligent valuation of a shareholding 419, 425

⁴⁴⁷ See *eg* the English Law Society's Guide to the Professional Conduct of Solicitors, the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes of 1. March 2004

⁴⁴⁸ OECD Report fn 430 19

⁴⁴⁹ ICDR Code of Ethics for Arbitrators in Commercial Disputes of 1. March 2004; American Arbitration Association Standards of Ethics and Business Conduct available from <<http://www.adr.org/EthicsAndStandards>> [14. September 2007]; Chartered Institute of Arbitrators Code of Professional and Ethical Conduct of September 2004 available from the Chartered Institute of Arbitrators and on file with the author and the IBA Guidelines of Conflicts of Interest in International Arbitration of 22. May 2004, the latter available from http://www.ibanet.org/publications/IBA_Guides_Practical_Checklists_Precedents_and_Free_Materials.cfm [14. September 2007]

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This raises the question whether arbitrators are immune from suit. Under one school of thought, the arbitrator may be contractually liable for breach of the implied duties to act judicially and to exercise proper care and skill. Under the other, the arbitrator carries out a judicial role and hence is immune from liability.⁴⁵⁰ English law subscribes to the second school of thought by granting a large degree of immunity to arbitrators and arbitral institutions. Neither the arbitrator nor the appointing institutions are liable for any act or omission in carrying out the arbitration, unless the claimant can show bad faith.⁴⁵¹ Although in this Chapter, the focus is not so much on the arbitrator's or institution's liability for damages⁴⁵², the questions of arbitral standards and the duties imposed on arbitrators are nevertheless relevant. Because of the high hurdle on liability, the issues relating to the arbitrator's duty to comply with due process arise in the context of a challenge of the award or proceedings for the removal of the arbitrator, as these may be avenues of redress an aggrieved party may seek, absent any evidence of bad faith.

2.2 Institutional and other arbitration rules

Arbitration institutions, such as the AAA, ICSID, CIArb, CIETAC, ICC, DIS, ICDR, LCIA have issued rules of arbitration governing arbitration procedures carried out under the auspices of the respective institution. Even where the parties do not choose to submit their dispute to arbitration through an institution, *ie* in an *ad hoc* arbitration, the parties usually refer to a set of arbitration rules (such as the UNCITRAL rules or some institutional rules) to govern the procedure. In either case, the rules are incorporated by reference into the arbitration agreement between the parties, the contract between the parties and the arbitrator and the contract between the institution and the arbitrator (if applicable). Hence the arbitrator, the parties and the institution are all contractually bound to comply with the rules, including any rules on due process.

⁴⁵⁰ A Redfern, M Hunter fn 270 285-287

⁴⁵¹ S.29 Arbitration Act 1996

⁴⁵² The question of immunity will not be further discussed.

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This thesis also takes into account several important policy documents dealing with the issue of standards for online arbitration (and ODR/ADR more generally): the European Commission Recommendation 98/257/EC and the Guidelines by the American Bar Association Task Force on E-commerce and ADR⁴⁵³, the OFT's Consumer Codes Approval Scheme and the Due Process Protocol of the American Arbitration Association⁴⁵⁴.

The 1998 EC Recommendation is addressed to the designers, operators and providers of arbitration for consumer disputes.⁴⁵⁵ Hence its scope is limited to consumer disputes. It provides for seven general principles which should apply to binding dispute resolution⁴⁵⁶: independence, transparency⁴⁵⁷, adversarial principle⁴⁵⁸, effectiveness⁴⁵⁹, legality⁴⁶⁰, liberty⁴⁶¹ and representation⁴⁶². These principles go some way to establishing minimum standards, but are very general and abstract and do not address some of the issues with due process, such as the conflict between funding and independence, the detailed fair hearing requirements, publication of awards and appeal systems. Hence it is suggested that the principles should be refined and developed along the lines discussed in this Chapter and Chapter Eight⁴⁶³ to make them more useful and avoid divergent interpretation by the Member States.⁴⁶⁴ Ideally the principles should be clothed in a Regulation to make them binding on the Member States.

⁴⁵³ Available from the ABA website:

<http://www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf> [14. September 2007]

⁴⁵⁴ <http://www.adr.org/sp.asp?id=22019> [14. September 2007]

⁴⁵⁵ Recommendation 98/257/EC, last sentence

⁴⁵⁶ This applies to arbitration and ombudsman schemes, see the Recitals to the Recommendation

⁴⁵⁷ This principle merely refers to information about the dispute resolution procedure

⁴⁵⁸ This refers to fair hearing in the sense discussed below 6-4

⁴⁵⁹ Conglomerate of different aspects: no need for legal representation, procedure free of charge or moderate costs, no undue delay in the decision-making, judge taking an active role

⁴⁶⁰ Consumer must be protected by the mandatory law applying in the consumer's state of residence- 4-4 and the duty to give reasoned decisions, 6-5

⁴⁶¹ The parties must have specifically agreed to the binding nature of the dispute resolution

⁴⁶² Parties may choose to be legally represented

⁴⁶³ 8-3

⁴⁶⁴ See also BEUC (European Consumers' Organisation) Position Paper 'Alternative Dispute Resolution' of 21. November 2002 BEUC/X/048/2002, pp. 2. 8

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2.3 National arbitration acts

National legislation is at the same time the most obvious and least obvious source of law in this discussion. Most obvious in the sense that it is not surprising that sovereign states can and do legislate with effect in their territory on any subject-matter whether this subject-matter is in the realm of private contract law or not. National arbitration legislation seems at the same time the least obvious source of law for the resolution of cross-border disputes on the internet. Indeed the whole point of the discussion of due process in this Chapter is to overcome the limitations of the rules of private international law as a species of national law. Yet it has to be acknowledged that regulation within a system of nation states is (still) carried out to a large extent at a national level, but in the field of arbitration, national laws have increasingly been assimilated due to the pressure exerted by the needs of the parties in commercial cross-border disputes.⁴⁶⁵

There is a convergence between different national rules in business arbitration. The result is that procedural rules have frequently evolved into an amalgam or hybrid between different legal cultures, as these different legal cultures cross-pollinate each other.⁴⁶⁶ This convergence is caused by the quest to improve procedural rules and exchanges at all levels through academic debate, through discussions between the parties involved in a particular arbitration procedure or at the political level in international institutions such as UNCITRAL. Instrumental for convergence have been the UNCITRAL Model Law⁴⁶⁷ (which some states have modelled their legislation on), arbitration rules (some of which have been drafted without reference to a particular seat), academic, comparative texts elaborating standards for international commercial arbitration⁴⁶⁸, international practice, and, most importantly, international conventions⁴⁶⁹ (which have limited states' power to refuse to enforce foreign arbitration awards). It is important to keep in mind this

⁴⁶⁵ A Redfern, M Hunter fn 270 77

⁴⁶⁶ W Park fn 40 7-8

⁴⁶⁷ Model Law on International Commercial Arbitration, adopted by UNCITRAL on 21. June 1985

⁴⁶⁸ A Redfern, M Hunter fn 270; JDM Lew et al fn 270

⁴⁶⁹ 6-2.6

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process of convergence when discussing sources of law, as it means that there is no hard and fixed line between national and international sources of law, but rather a mutually interdependent relationship, one influencing the other and vice versa.

Acknowledging the contribution and impact of international arbitration practice on national arbitration laws should, however, not be equated with ignoring the role of national arbitration laws, which are an important source of law, forming the interface for the different modes of regulation of arbitration. Most states have enacted national arbitration laws defining the rights and duties of the parties involved and delimiting the powers of the court to intervene in or to offer support to arbitration proceedings.

National legislation on arbitration pursues two aims: first it draws the outer limits of arbitration, *eg* by defining what disputes can and cannot be brought to arbitration and by imposing certain due process standards (mandatory provisions). Secondly national arbitration acts facilitate arbitration by providing for default rules where the parties or arbitration rules have not addressed a matter and by facilitating arbitration by lending the courts' powers to the parties (*eg* by staying legal proceedings). National laws apply by virtue of the parties choosing the seat of the arbitration to be within the territory of the state or by virtue of the fact that the award is to be enforced within the jurisdiction.

This Chapter concentrates on due process requirements under English law and international commercial practice, referring to the English Arbitration Act 1996 as a starting point for the discussion and making comparisons to the legislation of other jurisdictions where useful for the argument, without claiming to paint a complete picture of arbitration law in these jurisdictions, as space does not permit this.

At some stages in the discussion for the purposes of comparison, reference is made to US law and in particular the Federal Arbitration Act 1925⁴⁷⁰. In the US, of

⁴⁷⁰ USC Title 9

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course a distinction has to be made between federal and state law and arbitration laws can be found at both levels. The Federal Arbitration Act 1925 was enacted to overcome court rulings hostile to arbitration and refusing to order a stay of proceedings to enforce a pre-dispute arbitration agreement.⁴⁷¹ All fifty states and the District of Columbia have passed specific arbitration acts, usually modelled on the 1920 New York Arbitration Law or the Federal Arbitration Act.⁴⁷² Nevertheless, most arbitration law in the US is federal law, because of the wide definition of commerce in the Federal Arbitration Act itself and an even more elastic interpretation of the notion of interstate commerce by the US Supreme Court.⁴⁷³ The Federal Arbitration Act essentially applies in a maritime transaction or in a contract evidencing a transaction involving commerce⁴⁷⁴, which is defined as ‘commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia (...)’⁴⁷⁵. In the case of *Southland Corporation v Keating* the US Supreme Court extended the application of the Federal Arbitration Act to the state courts and confirmed the validity of an arbitration clause in a contract governed by state law, where the state law was in conflict with the Arbitration Act.⁴⁷⁶ The effect of this case law is that the Federal Arbitration Act now applies in federal question cases, diversity cases, in which state law applies and in cases before the state courts, applying state law but linked to interstate commerce. *Thomas Carbonneau* even calls the Federal Arbitration Act the ‘national American law of arbitration’⁴⁷⁷. Because of this supremacy of the Federal Arbitration Act over state arbitration law, the discussion of US law is largely restricted to the federal level.

⁴⁷¹ T Carbonneau *Cases and Materials on the Law and Practice of Arbitration* (2nd edition Juris Publishing 2000) 50-51

⁴⁷² R Reuben fn 128, 976

⁴⁷³ T Carbonneau fn 471 1954-1955, R Reuben fn 128 979-980

⁴⁷⁴ USC Title 9 § 2

⁴⁷⁵ USC Title 9 § 1

⁴⁷⁶ 465 US 1 (1984) 14-16; see also *Doctor's Associates Inc v Casarotto* 517 US 681 (1996) 686-687; see also *Allied-Bruce Terminix Cos v Dobson* 513 US 265 (1995), concerning an arbitration clause in a termite protection agreement for a house, the Court found that the FAA displaces state law to the contrary. For a more recent case see *Cooper v MRM Investment Co* 367 F3d 493, 498 (2004); however not all questions pertaining to arbitration are governed by federal law- for example the question whether the parties have concluded an arbitration agreement and whether the clause is conscionable may be determined by state contract law, see eg *Plaskett v Bechtel International Inc D Virgin Islands* (2003) 243 FSupp 2d 334.

⁴⁷⁷ T Carbonneau fn 471 57

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2.4 English common law

Natural justice⁴⁷⁸ is a time-honoured doctrine of the English common law, which applies to all decision-making in judicial or administrative proceedings, affecting the rights, property or legitimate expectations of an individual.⁴⁷⁹ It comprises two fundamental maxims guaranteeing equal treatment⁴⁸⁰: *nemo judex in sua causa*⁴⁸¹ (impartiality and independence of the judge) and *audi alteram partem*⁴⁸² (fair hearing). This raises the question of whether *common law* natural justice equally applies to private dispute resolution processes, based, at least to some extent, on contractual relationships.

The next section discussed in detail whether *constitutional* (as opposed to common law) due process applies to private decision-making.

However, notwithstanding the recent incorporation of the European Convention of Human Rights (ECHR)⁴⁸³ into UK law, the legal *tradition* of the UK is different from that of states such as the US and other European countries with a written, higher-ranking constitution incorporating human rights standards such as due process and the right to a fair trial, but only (at least directly) applying it to state actors.⁴⁸⁴ Since the common law has developed incrementally drawing analogies between cases, there was no need for such a bold differentiation between public and private law. English judges have simply stated that natural justice also applies to someone acting in a private but quasi-judicial function. Case law has long established that a private body, such as a sports club, may also be subject to the rules of natural justice, when making a decision affecting a member based on

⁴⁷⁸ It is roughly the equivalent to 'due process' in US parlance.

⁴⁷⁹ G Flick *Natural Justice Principles and Practical Application* (2nd ed Butterworths Sydney 1984) 26-27

⁴⁸⁰ SH Bailey, JPL Ching, MJ Gunn, DC Ormerod *Smith, Bailey and Gunn: On the Modern Legal System* (4th ed Sweet & Maxwell London 2002) 1315. G Flick fn 479 26

⁴⁸¹ No-one be a judge in his own cause

⁴⁸² Hear the other party

⁴⁸³ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4. November 1950, signed at Rome TS 71 (1953) Cmd 8969; ETS No5 1950

⁴⁸⁴ See 8-2.5

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contract.⁴⁸⁵ This paved the way for applying the same principles to other private adjudicatory systems.⁴⁸⁶ Hence it is clear that, in the UK, the common law rules of natural justice do not only apply to public bodies or bodies exercising a public function, but also to arbitration.⁴⁸⁷

2.5 Human rights standards

This section is about the right to a fair trial contained in the ECHR and the due process standards enshrined in the US Constitution. The human rights contained in the ECHR and the US Constitution are primarily addressed to states, not private actors. Hence the main issue discussed in this section is the question of whether these human rights standards apply to arbitration as a private dispute resolution process. It is argued that, in principle, the due process standards *should* apply indirectly for the reason that states lend their hand in supporting and enforcing arbitration awards.

2.5.1 ECHR/ European Convention of Human Rights

For English law, in addition to the traditional principles of natural justice, another source of due process principles has been the ECHR, now incorporated into English law by the Human Rights Act 1998⁴⁸⁸. This section of the dissertation also takes into account the interpretation of the ECHR by the Strasbourg institutions⁴⁸⁹, which the English courts must pay heed to.⁴⁹⁰ If English law applies, the English courts have to read, interpret and apply English legislation (including the Arbitration Act

⁴⁸⁵ *Wood v Woad* (1874) LR 9 Ex 190; *Calvin v Carr* [1980] AC 574 (PC) 596; *R (Irvine) v The Royal Burgess Golfing Society of Edinburgh* [2004] LLR 334 (Court of Session) para 25; G Flick fn 479 32-33

⁴⁸⁶ eg *R v Gough* [1993] 97 Cr App R 188 (HL) 199; *AT&T v Saudi Cable Co* [2000] 2 Lloyd's Rep 127 (Comm) 138 (LJ Potter)

⁴⁸⁷ See 6-3.2, 6-4.2

⁴⁸⁸ S.1 and Sch.1 Human Rights Act 1998

⁴⁸⁹ ie the European Commission of Human Rights (EComHR) and European Court of Human Rights (ECtHR) before the 1998 reforms. and now the European Court of Human Rights (ECtHR)

⁴⁹⁰ S.2 (1) Human Rights Act 1998

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1996) in accordance with the ECHR under section 3 (1) of the Human Rights Act 1998.

Article 6 (1) of the ECHR reads:

‘In the determination of his civil rights and obligations (...), everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal *established by law*. (...)’

Since the incorporation of the ECHR it is clear that it forms part of English law. However this does not answer the question whether the standards of due process established in the ECHR do apply to a (private) arbitration tribunal. First it should be noted that, *prima facie* human rights instruments govern a state’s relationship with its citizens (vertical effect) as opposed to the relationships between citizens (horizontal effect).⁴⁹¹ Hence it is far from obvious that the ECHR should apply in the private relationship between the arbitration tribunal and the parties.

In the context of English law, under section 6 (1) of the Human Rights Act 1998, any act of a public authority must be compatible with the ECHR and a public authority includes a *court or tribunal*.⁴⁹² Hence, clearly, Article 6 (1) applies to the *courts* in proceedings related to arbitration⁴⁹³, albeit that occasionally the courts have even here found a waiver of rights in respect of the court proceedings (*eg* regarding confidentiality⁴⁹⁴). The consequence of this is that if an English court is acting under its supervisory jurisdiction (where England is the seat of arbitration) or its enforcement jurisdiction (where England is the place of enforcement), the courts have an obligation to act in accordance with the ECHR. However the issue here is

⁴⁹¹ A Jaksic *Arbitration and Human Rights* (Peter Lang Frankfurt a/M 2002) 60; see Art.1 ECHR-a detailed examination of indirect effects of human rights is beyond the scope of this dissertation.

⁴⁹² S.6 (2): an arbitration tribunal is unlikely to be a ‘tribunal’ within the meaning of the Human Rights Act 1998, which defines a tribunal as one ‘in which legal proceedings can be brought’ (s.21)

⁴⁹³ *North Range Shipping Ltd v Seatrans Shipping Corporation* [2002] 1 WLR 2397 (CA) para 27, confirmed in *CGU International Insurance Plc v AstraZeneca Insurance Co Ltd* [2006] EWCA Civ 1340 (CA) para.59 Judgment of 16. October 2006

⁴⁹⁴ *City of Moscow v Bankers Trust* [2005] QB 207 (CA) para 39

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whether the ECHR also applies to the arbitration tribunal itself- it not being a *public* tribunal or a *tribunal established by law*.

(a) The due process rule of the ECHR and its application to arbitration

The potential for arbitration conflicting with the right to a fair hearing in a court of law arises, since a valid arbitration agreement blocks either party's way to obtain resolution of the dispute by the ordinary, 'proper' courts *established by law*. The reason for this is that arbitration agreements are binding (in the sense that the courts order a stay of legal proceedings⁴⁹⁵) and the ultimate award is also binding and enforceable⁴⁹⁶. Hence, in theory, an arbitration agreement may deprive a person of their right to a fair trial in a court and hence to their entitlement under Article 6 (1) of the ECHR.

Because of the binding nature and finality of arbitration, the central question here is whether the due process rights enshrined in Article 6 (1) apply to arbitration.

Since the human rights standards espoused in the ECHR are primarily applicable to state actors, it is questionable whether these human rights standards can also be invoked in relationships between private parties⁴⁹⁷. The doctrine of the horizontal applicability of human rights may be one argument for the applicability of Article 6 to arbitration, especially since it is doubtful whether arbitration is a purely private process.

Unsurprisingly there is no agreement on this complex question. Essentially three theories can be distinguished.⁴⁹⁸ The first theory holds that the guarantee of a fair

⁴⁹⁵ s.9 (4) Arbitration Act 1996

⁴⁹⁶ s.66 (1) Arbitration Act 1996

⁴⁹⁷ C Jarrosson 'L'Arbitrage et la Convention européenne des droits de l'Homme' [1989] *Revue de l'arbitrage* 573-607, 578-580

⁴⁹⁸ Aharon Barak in his chapter on the horizontal effect of constitutional human rights even distinguishes four theoretical approaches. Apart from the non-applicability, direct and indirect applicability he also mentions a judiciary model, where human rights are not applied to private actors as such, but must be applied by the judiciary as an organ of the state. In my nomenclature, this would be subsumed under

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trial in Article 6 (1) applies directly to arbitration, the second theory that it applies indirectly and the third theory that it does not apply at all.

Why is it important whether Article 6 (1) applies directly or indirectly? If Article 6 (1) applies directly, the guarantees contained in that article apply fully, just as they apply to a court of law and parties can invoke Article 6 (1) against each other. If Article 6 (1) only has indirect applicability then a party cannot rely directly on Article 6 (1) when challenging an award. Instead the award has to be challenged on some other basis, such as a national arbitration law and the courts then have an obligation to interpret this law in accordance with Article 6 (1), as far as possible. This indirect application clearly leaves scope for interpretation, so that not all guarantees apply or if they do apply indirectly, only in modified form.

(b) Delegation theory

Some authors have argued that Article 6 (1) of the ECHR is *directly* applicable to an arbitration tribunal for the reason that the arbitration tribunal in fact carries out a quasi-judicial function, a function traditionally exclusively exercised by the courts and hence delegated to the arbitration tribunal by law. Because of this delegation of the judicial function, the arbitration tribunal would be subject to obligations of due process. Authors subscribing to this delegation theory, such as *Jaksic*, argue that⁴⁹⁹:

‘Arbitration is adjudication of the dispute ending in a final and binding arbitral award, which is provided with *res judicata* effect. Although there are individuals who confer upon the arbitrators the power to resolve their dispute, arbitration is neither an isolated nor abstracted institution which should evade the applicability of human rights norms.’

indirect applicability. See A Barak ‘Constitutional Human Rights and Private Law’ in *Human Rights in Private Law* (Hart Oxford 2001) 13-42

⁴⁹⁹ A Jaksic fn 491 203; S Schiavetta fn 352 4.1

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Whether one finds the delegation theory persuasive depends on one's view of the nature of arbitration and one's view on whether dispute resolution is essentially a public or private function. If one regards arbitration as being driven by the preference of the parties, one could argue that the delegation theory ignores the significance of the contractual basis of arbitration. In this view, the delegation theory is unconvincing, as the state has not delegated its judicial function to the tribunal, but the parties have simply chosen to go to a private tribunal instead of the courts by concluding the arbitration agreement (opting out).

On the other hand if one regards arbitration as being driven by the lack of efficient public dispute resolution processes, so that the only option is arbitration, then one could argue that states have failed to provide this public function and have instead chosen to delegate this function to a private tribunal. The argument here is that states have not enacted arbitration-friendly laws primarily for the reason that they respect individual freedom and party autonomy in contract law, but that states have been motivated by the recognition that if the cost of some dispute resolution is shifted to the private sector, the burden on the publicly financed courts is reduced.⁵⁰⁰

(c) Indirect applicability

The second theory is that the ECHR is indirectly applicable. This theory recognises that the courts do not in fact or in law delegate their functions to an arbitration tribunal, and that arbitration is based on the parties' contractual choice.

Nevertheless this theory also accepts that arbitration is not entirely private: the courts are still involved in arbitration. The courts of the seat of arbitration or the courts at the place of enforcement have (albeit limited) jurisdiction to set aside or enforce an award, as the case may be. This (actual or potential) involvement of the courts- as organs of the state- means that the ECHR is (at least) indirectly

⁵⁰⁰ T Carboneau 'Arbitral Justice: the Demise of Due Process in American Law' (1996) 70 *Tulane Law Review* 1945, 1958-1959

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applicable.⁵⁰¹ *Georgios Petrochilos* points out that national law must be interpreted in accordance with the ECHR.⁵⁰²

(d) Direct or indirectly applicable

It is submitted that the second theory, *ie* that Article 6 (1) of the ECHR is indirectly applicable, is the most convincing theory for voluntary arbitration. The first theory is not entirely convincing, where the parties had a choice to go to the courts and could have included a jurisdiction clause in their agreement, but instead agreed to use arbitration. On the other hand direct applicability of the ECHR is appropriate in cases of compulsory arbitration (discussed below), as here the authority of the arbitration tribunal is not based on the parties' choice but on law.⁵⁰³ Therefore it is necessary to make a distinction between voluntary and compulsory arbitration.

(e) Distinction between voluntary and compulsory arbitration

However, at times it might be difficult to decide whether or not a party has submitted to arbitration out of their own free will. In *Deweer v Belgium* a butcher was prosecuted for having sold pork and beef at too high a profit margin and he was given the invidious choice between paying a fine in full settlement or having his shop closed awaiting criminal prosecution. Unsurprisingly he opted (under protest) for the former. The Court found that he had *not* voluntarily waived his right to go to court and hence had been deprived of his due process rights.⁵⁰⁴ In *Le Compte, Van*

⁵⁰¹ F Matscher 'Schiedsgerichtsbarkeit und EMRK' in Habscheid/Schwab *Beiträge zum internationalen Verfahrensrecht und Schiedsgerichtsbarkeit* (Festschrift für Heinrich Nagel Münster 1987) 237, see also A Redfern, M Hunter fn 270 77, 493: 'an arbitration agreement may constitute a waiver of the right of access to the courts, but it is surely not intended to be a blanket waiver of the guarantees to a "fair hearing" contained in Art.6' and also G Kaufmann-Kohler, T Schultz fn 224 198, also W Robinson, B Kasolowsky 'Will the United Kingdom's Human Rights Act Further Protect Parties to Arbitration Proceedings?' (2002) 18 (4) *Arbitration International* 453-466 (460), A Samuel 'Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights' (2004) 21(5) *Journal of International Arbitration* 413-438, 416; G Petrochilos *Procedural Law in International Arbitration* (Oxford University Press 2004) 130, 152-153

⁵⁰² G Petrochilos fn 501 156

⁵⁰³ C Liebscher *The Healthy Award* (Kluwer Law International The Hague 2003) 74

⁵⁰⁴ *Deweer v Belgium* (1979-80) 2 EHRR 439 (ECt HR) 462-463

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Leuven and de Meyere the ECtHR found that the applicants had not waived their right to a public hearing in disciplinary proceedings through their (compulsory) membership of a medical professional body.⁵⁰⁵ In *Thompson v UK*⁵⁰⁶ the defendant of an absence without leave charge agreed to summary trial (as opposed to trial by court martial) by the commanding officer in circumstances where he was in the presence of the superior officer and not informed about his rights and the ECtHR held that this was not a valid waiver.

By contrast in *Axelsson v Sweden* four taxi owners were members of a trade association, the Malmö Taxi Economic Association, which they *had* to be a member of, if they wished to obtain business from the local taxi despatch. The membership agreement provided for arbitration of all disputes. The Commission found that this was a voluntary and valid waiver of their right to have their dispute heard by an ordinary court and hence found the complaint inadmissible.⁵⁰⁷

Essentially, arbitration is voluntary and not compulsory if it is based on an agreement between the parties which was free from duress, undue influence or mistake, even if the arbitration was imposed by a private, monopolistic organisation and all persons wishing to undertake a certain activity (such as acting as football players' agent or driving a taxi) had to agree to it. Arbitration is only compulsory, if it is required by law (such as a statutory requirement).⁵⁰⁸

If participation in the arbitration is not voluntary but compulsory, *eg* under a statute, the arbitral proceedings must comply in full with the due process rights set out in Article 6 (1) or be subject to review by a body (such as a court) that does.⁵⁰⁹ As *Adam Samuel* has pointed out, there are many tribunals (whether permanent or *ad hoc*) carrying out proceedings called 'arbitration' which are part of the state's

⁵⁰⁵ (1982) 4 EHRR 1 (ECtHR) 22

⁵⁰⁶ *Thompson v United Kingdom* (2005) 40 EHRR 11 (ECtHR) Para 45

⁵⁰⁷ *Axelsson v Sweden* EcomHR Admissibility Decision of 13. July 1990 No 11960/86 available from the HUDOC database, *Stretford v Football Association* [2007] AllER (D) 346 (Mar) (CA) Para. 49, Judgment of 21. March 2007

⁵⁰⁸ *Stretford v Football Association* [2007] fn 507 Paras.48- 49 and 52

⁵⁰⁹ *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 (ECtHR) 545

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machinery to solve disputes so that it is sometimes difficult to draw a clear line between public and private dispute resolution.⁵¹⁰

The case of *Bramelid and Malmström v Sweden* concerned mandatory arbitration to determine the price of shares which were compulsorily sold to the majority shareholder under Swedish company legislation. Here the EComHR said that mandatory arbitration is permissible provided that there is recourse to a court, which has the power to review the case both as to facts⁵¹¹ and law, in order to guarantee the due process rights granted by Article 6 (1).⁵¹² This case has interesting consequences for court-mandated forms of ADR- here the due process rights would have to be guaranteed in full and Article 6 (1) is directly applicable⁵¹³.

Having discussed the first two theories on the applicability of the ECHR, it remains to examine the theory that it does not apply at all.

(f) Absolute waiver theory

The third theory is that the due process standards in the ECHR do not apply to arbitration at all, since the arbitration tribunal is not a tribunal established by law and the arbitration agreement is a waiver of the right to go to court and the due process rights applicable to the courts.⁵¹⁴ The logic of the absolute waiver theory is that the arbitral tribunal derives its authority and mandate from the private agreement of the parties and hence, not from the state, and that therefore, the ECHR is not applicable to this private, horizontal relationship.⁵¹⁵ This theory is unconvincing and should be rejected.

⁵¹⁰ A Samuel fn 501 413; see also 8-2.2

⁵¹¹ See also *Le Compte, Van Leuven and de Meyere v Belgium* (1982) 4 EHRR 1 (ECtHR) 22

⁵¹² (1983) 5 EHRR 249 (EComHR) 258-259

⁵¹³ W Robinson, B Kasolowsky fn 501 455

⁵¹⁴ Supporters of this absolute waiver theory do not necessarily argue that the absolute waiver does not imply that no due process rights apply to arbitration, it merely means that such rights are not based on Art.6 (1) ECHR

⁵¹⁵ A view taken by C Jarrosson 'L'Arbitrage et la Convention européenne des droits de l'Homme' [1989] *Revue de l'arbitrage* 573-607, 588-589; he concedes, though that the ECHR may have some indirect influence on arbitrators

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Firstly, as has been discussed above in the context of the indirect applicability of the ECHR, states support arbitration and enforce arbitration awards, hence endorsing the process. Thus states' responsibility under Article 6 (1) is indeed engaged if they condone flagrant breaches of the ECHR by giving effect to arbitral awards which infringe fundamental principles of due process.⁵¹⁶

Secondly, while it is clear that the arbitration agreement does in fact waive the parties' right to go to court, it does not logically follow that the parties have also waived all due process enshrined in Article 6 (1). Authors in favour of the absolute waiver theory quote the case of *Nordström-Janzen and Nordström-Lehtinen*, where the EComHR emphasized that the parties had waived their due process rights: 'there was a renunciation by the parties of a procedure before the ordinary courts, satisfying *all* the guarantees of Article 6 of the Convention'.⁵¹⁷ However the EComHR did *not* say that therefore the parties did not enjoy *any* of these guarantees.⁵¹⁸

In fact, in the *Nordström-Janzen and Nordström-Lehtinen* case, the Commission examined to what extent the national legislative framework for arbitration allowed some control over the due process of arbitration and found that this control existed and had been properly exercised.⁵¹⁹ Hence, in this case the question was not whether the arbitration itself complied with Article 6 (1), but instead whether the national courts are ensuring that in case of breach of due process, the award can be challenged. However the Commission also stressed that the Contracting States may decide themselves 'on which grounds an arbitral decision should be quashed', giving the state concerned a wide margin of discretion in applying the due process

⁵¹⁶ See for example in *Bramelid and Malström v Sweden* (1983) 5 EHRR 249 (EComHR), a case in which one party had had an opportunity to appoint an arbitrator, whereas the other had not. The EComHR found the case admissible.

⁵¹⁷ *Nordström-Janzen and Nordström-Lehtinen v the Netherlands* EComHR Admissibility Decision of 27. November 1996 No 28101/95 available from the HUDOC database

⁵¹⁸ W Robinson, B Kasolowsky fn 501 462

⁵¹⁹ *ibid*

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principles.⁵²⁰ This case goes probably too far in leaving due process standards wholly to the national courts⁵²¹ and has been contradicted by later decisions, such as *Suovaniemi*⁵²².

The absolute waiver theory has not been confirmed by the jurisprudence of the Strasbourg institutions. For example in the case of *Jakob Boss v Germany* the EComHR found that the fact that the parties have entered into an arbitration agreement

‘does not mean, however, that the respondent State's responsibility is completely excluded as the arbitration award had to be recognised by the German courts and be given executory effect by them. The courts thereby exercised a certain control and guarantee as to the fairness and correctness of the arbitration proceedings which they considered to have been carried out in conformity with fundamental rights and in particular with the right of the applicant company to be heard.’⁵²³

In the *Suovaniemi* case⁵²⁴ the European Court of Human Rights expressly said that the fact that the parties have entered into an arbitration agreement and thereby validly *waived* their right to go to a public court, does not mean that they have forsaken *all* due process rights (such as the right to an impartial arbiter).⁵²⁵ The Court said that the very core of Article 6 (1) rights apply to arbitration.⁵²⁶ In conclusion, the absolute waiver theory does not withstand scrutiny and should therefore be rejected.

⁵²⁰ *ibid*

⁵²¹ S Schiavetta fn 352 Fn 56

⁵²² See below

⁵²³ Admissibility Decision of 2. December 1991 No 18479/91 available from the HUDOC database

⁵²⁴ *Suovaniemi and others v Finland* ECtHR Admissibility Decision of 23. February 1999 No 31737/96 available from the HUDOC database

⁵²⁵ *ibid* 5

⁵²⁶ *ibid* 5

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(g) Significance of waivers

To recap, above, it is hoped that the absolute waiver theory has been refuted. Article 6 (1) applies to arbitration, either directly, as in the case of compulsory arbitration or indirectly, as in the case of voluntary arbitration. In other words, the arbitration agreement is considered to constitute a general waiver of the right to go to court, but not of *all* due process rights enshrined in Article 6 (1).⁵²⁷ The distinction between a waiver of the right to go to court and a *specific* waiver of due process rights is critical and this distinction is not always clearly drawn in the discussion.

The fact that an arbitration agreement is no general waiver of all due process rights does not necessarily mean that the parties cannot, in addition, renounce a specific right. To put it another way, in arbitration proceedings two different types of waivers should logically be distinguished.⁵²⁸ One is the parties generally waiving their right to go to the ordinary courts to seek resolution of their dispute, *ie* the arbitration agreement.⁵²⁹ The other form of waiver would be one or both parties specifically relinquishing a specific right in particular circumstances, such as a party reaffirming or not opposing the nomination of a particular arbitrator in full awareness of a conflict of interest, which the arbitrator has previously disclosed to the parties.

As has been seen above, this distinction has never consistently and clearly been made in the jurisprudence of the ECtHR or the English courts.⁵³⁰ The jurisprudence can be criticised because of this failure to distinguish between a general waiver not to go to court and a waiver of a *specific* right. Hence, a general waiver of the

⁵²⁷ *Stretford v Football Association* [2007] AllER (D) 346 (Mar) (CA) Para. 65, Judgment of 21. March 2007

⁵²⁸ M Kurkela *Due Process in International Commercial Arbitration* (Oceana New York 2005) 30-31

⁵²⁹ *ibid*

⁵³⁰ *Nordström-Janzen and Nordström-Lehtinen v the Netherlands* EComHR Admissibility Decision of 27. November 1996 No 28101/95 available from the HUDOC database; see also the case of *BLCT Ltd v J Sainsbury Plc* [2004] 2 P&CR 3 (CA) 44

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parties' right to go to court has, at times been misused as justification for limiting due process rights in arbitration.⁵³¹

(h) Requirements for waivers

However, because of the importance of due process, the Strasbourg institutions have established, as a safeguard, certain requirements which a general or specific waiver must fulfil. A waiver must be 'must be supported by minimum procedural guarantees commensurate to the importance of the rights waived'.⁵³² Therefore for a waiver to be valid, it must be clear and unambiguous⁵³³, as well as express⁵³⁴ and informed⁵³⁵ and must not run counter to an important public interest⁵³⁶. This latter requirement suggests that not all rights can be completely waived (*eg* such as the rule against partiality), but this is a question on which there is no authority and which, ultimately is not clear.⁵³⁷ For a waiver to qualify as *informed*, it must be undertaken in full awareness of the legal implications. Agreement to this can be evinced, *eg* by the party entering into an arbitration agreement being legally advised.⁵³⁸

⁵³¹ *ibid*

⁵³² *Suovaniemi and others v Finland* ECtHR Page 5 Admissibility Decision of 23. February 1999 No 31737/96 available from the HUDOC database; see also for a recent criminal case *Thompson v United Kingdom* (2005) 40 EHRR 11 (ECtHR) Para 43

⁵³³ 'unequivocal', see *LeCompte, De Meyere, Van Leuven v Belgium* (1982) 4 EHRR 1 (ECtHR) Para 59; *Håkansson and Stureson v Sweden* (1991) 13 EHRR 1 (ECtHR) 16; *Suovaniemi and others v Finland* ECtHR Page 5 Admissibility Decision of 23. February 1999 No 31737/96 available from the HUDOC database, *Thompson v United Kingdom* (2005) 40 EHRR 11 (ECtHR) Para 43

⁵³⁴ *McGonnell v UK* (2000) 30 EHRR 289 (Court) para 44; *Paul Stretford v (1) Football Association Ltd (2) Barry Bright* [2006] EWHC 479 (Ch), para. 42

⁵³⁵ *Suovaniemi and others v Finland* ECtHR Page 6 Admissibility Decision of 23. February 1999 No 31737/96 available from the HUDOC database, *Thompson v United Kingdom* (2005) 40 EHRR 11 (ECtHR) Para 44; *Paul Stretford v (1) Football Association Ltd (2) Barry Bright* [2006] EWHC 479 (Ch), para. 42

⁵³⁶ *LeCompte, De Meyere, Van Leuven v Belgium* (1982) 4 EHRR 1 (ECtHR) Para 59; *Håkansson and Stureson v Sweden* (1991) 13 EHRR 1 (ECtHR) 16; *Suovaniemi and others v Finland* ECtHR Page 5 Admissibility Decision of 23. February 1999 No 31737/96 available from the HUDOC database, *Thompson v United Kingdom* (2005) 40 EHRR 11 (ECtHR) Para 43; *Stretford v Football Association* [2007] AllER (D) 346 (Mar) (CA) Para. 56. Judgment of 21. March 2007

⁵³⁷ *Suovaniemi and others v Finland* ECtHR Page 5 Admissibility Decision of 23. February 1999 No 31737/96 available from the HUDOC database

⁵³⁸ *Suovaniemi and others v Finland* ECtHR Page 6 Admissibility Decision of 23. February 1999 No 31737/96 available from the HUDOC database: cf *Pfeifer and Plankl v Austria* (1992) 14 EHRR 692 (ECtHR) para 78 (no legal assistance hence waiver invalid)

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Similar jurisprudence can be found in England. The English courts also have consistently held that a waiver of an aspect of the right to a fair trial must be voluntary and fully informed.⁵³⁹ In the Court of Appeal case of *Smith v Kvaerner* Lord Phillips, CJ observed:

‘the party waiving should be aware of all the material facts, of the consequences of the choice open to him, and given a fair opportunity to reach an un-pressured decision’.⁵⁴⁰

In that case, the Court of Appeal found that a waiver was not valid, as it had not been fully informed and voluntary. Although the party later alleging bias had been informed of the judge’s conflict of interest, he had not been fully informed of the consequences of objecting to the judge and in particular he had not been told how quickly the case could be tried, if it had to be listed again.⁵⁴¹ The Court of Appeal also found that the waiver was not voluntary as his Counsel in effect advised him to waive this right.⁵⁴²

(i) Conclusion

In summary, a minimum of procedural protections is guaranteed through the direct⁵⁴³ or indirect⁵⁴⁴ application of Article 6 (1). The absolute waiver theory is not supported by the jurisprudence of the Strasbourg institutions. It is also to be rejected on the grounds of principle in that it ignores the court’s involvement in arbitration and it illogically confuses the parties’ waiver not to go to court with a waiver of all due process rights. Hence the fundamental principles of due process such as

⁵³⁹ In the context of procedural rights in litigation: *R v Bow Street Magistrate ex parte Pinochet (No.2)* [2000] 1 AC 119 (HL) 137 (Lord Browne-Wilkinson), *Millar v Dickson* [2001] 1 WLR 1615 (HL) 1629 (Lord Bingham), *Peter Smith v Kvaerner* [2006] EWCA Civ 242 (CA) para 29

⁵⁴⁰ *Peter Smith v Kvaerner* [2006] EWCA Civ 242 (CA) para 29

⁵⁴¹ *ibid* 31

⁵⁴² *ibid* 32, 37

⁵⁴³ In the case of compulsory arbitration

⁵⁴⁴ In the case of voluntary arbitration

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equality of arms between the parties in the hearing, giving every party a reasonable opportunity to present their case under conditions which do not place that party at a significant disadvantage towards its opponent⁵⁴⁵ and the impartiality and independence of the arbitrator⁵⁴⁶ must be guaranteed despite the existence of a general agreement to arbitrate. By contrast other due process rights, such as publicity⁵⁴⁷ or the right to appeal may be modified under the ECHR in voluntary, private dispute resolution processes, simply because of the inherent nature of the particular private dispute resolution process⁵⁴⁸. Albeit that an agreement to arbitrate is not a general waiver of due process, the impact of the ECHR on due process has been extremely limited for this reason⁵⁴⁹ and only very few of the cases in this area have been successful. An additional reason for this is that the indirect application of Article 6 (1) to arbitration gives only minimal protection, as the Contracting States are allowed a wide margin of discretion and usually the applicable arbitration law or *ordre public* already provides for such a minimum of rights (as does the Arbitration Act 1996)⁵⁵⁰. Another reason is that the parties can waive particular rights by a specific waiver. The consistent tenor of the Strasbourg cases is that so long as the parties have validly waived their rights, the courts have no duty to intervene.⁵⁵¹ Hence on the whole, the ECHR has historically not had a substantial practical impact in progressing due process rights in arbitration generally. The argument can be made in the future, that with the increasing use of arbitration in non-commercial disputes, there is a need to re-examine the waiver doctrine.⁵⁵²

⁵⁴⁵ *Dombo Beheer BV v Netherlands* (1994) 18 EHRR 213 (ECtHR) 230-contrast this with *Jakob Boss v Germany* (EComHR) Admissibility Decision of 2. December 1991 No 18479/91 available from the HUDOC database

⁵⁴⁶ *Suovaniemi and others v Finland* ECtHR Admissibility Decision of 23. February 1999 No 31737/96 available from the HUDOC database; ECtHR considered the impartiality question, but found specific and unequivocal waiver.

⁵⁴⁷ *Nordström-Janzen and Nordström-Lehtinen v the Netherlands* EComHR Admissibility Decision of 27. November 1996 No 28101/95 available from the HUDOC database

⁵⁴⁸ See also the case of *BLCT Ltd v J Sainsbury Plc* [2004] 2 P&CR 3 (CA) 44

⁵⁴⁹ W Robinson, B Kasolowsky fn 501 466; A Samuel fn 501 426; C Jarroson 'L'Arbitrage et la Convention européenne des droits de l'Homme' [1989] *Revue de l'arbitrage* 573-607, 593-594

⁵⁵⁰ A Samuel fn 501 419

⁵⁵¹ A Samuel fn 501 416

⁵⁵² See 7-4.4

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2.5.2 US constitutional due process standards

The notion of procedural due process as enshrined in the US Constitution fulfils an equivalent function to the notion of natural justice under the English common law.⁵⁵³ The 5th⁵⁵⁴ and 14th⁵⁵⁵ Amendment guarantee that individuals may not be deprived of their life, liberty nor property without due process of law. The essential tenets of due process have been stated by the US Supreme Court in the seminal case of *Goldberg v Kelly*⁵⁵⁶. They are: the right to an impartial judge⁵⁵⁷, notice of the case and the opportunity to be heard⁵⁵⁸, the right to present evidence⁵⁵⁹, the right to retain counsel⁵⁶⁰ and the right to obtain a written statement of the decision with reasons⁵⁶¹.

The due process clauses in the US Constitution are a restriction on government power and hence only apply to private actors if they can be brought within the confines of the state action doctrine. A private actor performs a state action if he or she carries out a public function and there is a close nexus to government administration.⁵⁶² The dominant view is that the extra-judicial resolution of disputes is not an exclusive governmental function and hence arbitration is not 'state action'.⁵⁶³ In numerous cases, US State⁵⁶⁴ and Federal⁵⁶⁵ courts have held that arbitration is not state action even if awards are ultimately enforced by the courts. For example in *Davis v Prudential Sec Inc* the Court said 'that the mere

⁵⁵³ HJ Friendly fn 33 1269, 1277 *Judge Friendly* points out, however that in the US constitutional due process only applies to agencies of the state

⁵⁵⁴ Applying to federal government, its courts and agencies

⁵⁵⁵ Applying to state governments, agencies and courts

⁵⁵⁶ 397 US 254, 260-267 (1970)

⁵⁵⁷ *ibid* 271

⁵⁵⁸ *ibid* 267-268

⁵⁵⁹ *ibid* 268

⁵⁶⁰ *ibid* 270

⁵⁶¹ *ibid* 271

⁵⁶² R Reuben fn 128 990

⁵⁶³ R Reuben fn 128 997; HJ Friendly fn 33 1269, 1277

⁵⁶⁴ *MedValUSA Health Programs Inc v Memberworks Inc* 273 Conn 634, 641-654

⁵⁶⁵ *Davis v Prudential Sec Inc* 59 F3d 1186, 1190-1192 (11th Cir 1995); *Federal Deposit Ins Corp v Air Florida Sys Inc* 822 F2d 833, 842 n9 (9th Cir 1987); *Elmore v Chicago & Illinois Midland Ry Co* 782 F2d 94, 96 (7th Cir 1986); *Austern v Chicago Bd Options Exch. Inc* 716 FSupp 121, 125 (SDNY 1989) affirmed 898 F2d 882 (2nd Cir) cert denied 498 US 850 (1990)

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confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause⁵⁶⁶. Hence the idea of indirect applicability of due process has not held sway with the US courts and the traditional and dominant approach of US law has been bipolar, in other words a black and white distinction is made between trial in the public courts, which is subject to constitutional due process and arbitration, which is a private process and hence not subject to constitutional process.⁵⁶⁷ Furthermore, the arbitration agreement has traditionally been regarded as an absolute waiver of the right to a fair trial.⁵⁶⁸ For example in *Bowen v Amoco Pipeline Company* the US Court of Appeals for the 10th Circuit held that the defendant had voluntarily entered and participated in arbitration⁵⁶⁹ and was hence barred from arguing a due process violation.⁵⁷⁰ Because of the waiver, the Court found it unnecessary to decide whether or not arbitration is state action.⁵⁷¹

The reason for the bipolar approach of the US doctrine and the courts is that the formality of constitutional due process and the informality of arbitration are regarded as antithetical.⁵⁷² The upshot of this is that the due process clauses in the Constitution do not apply to arbitration. Of course this does not mean that due process is inapplicable to arbitration-it only means that the US Constitution is not a source of law for due process requirements.

2.6 International conventions

The most important international convention in this area is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁵⁷³.

⁵⁶⁶ 59 F3d 1186, 1192 (11th Cir 1995)

⁵⁶⁷ R Reuben fn 128 953. HJ Friendly fn 33 1269, 1277

⁵⁶⁸ See eg cases where the arbitration agreement has been held to be a waiver of the 7th Amendment (right to trial by jury): *Dillard v Merrill Lynch* 961 F2d 1148, 1155 (5th Circuit 1992); *Kimbrough v Holiday Inn* 478 F Supp 566, 577 (ED Pa 1979)

⁵⁶⁹ In fact it had compelled arbitration

⁵⁷⁰ 254 F3d 925, 940

⁵⁷¹ *ibid*

⁵⁷² R Reuben fn 128 1046

⁵⁷³ 330 UNTS 3 (NYC), adopted New York 10. June 1958, entered into force on 7. June 1959.

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This provides for the recognition and enforcement of international arbitration agreements⁵⁷⁴ and the recognition and enforcement of foreign arbitral awards⁵⁷⁵. The New York Convention provides an exhaustive list of the grounds on which the Contracting States can refuse to recognise and enforce a foreign award in their jurisdiction. Thereby it limits the Contracting States' ability to refuse such enforcement. However, the New York Convention does contain the 'catch all' exception to enforcement- public policy, in order to allow States a margin of discretion where enforcement would be contrary to fundamental values of the state in which enforcement is being sought. Nevertheless States have accepted that the New York Convention has laid down a clear policy in favour of enforcement. Because of the recognition of the importance of arbitration for international trade Contracting States have exercised self-restraint and limited the (potentially wide) public policy restriction normally applied to the enforcement of foreign judgments. As a result, the enforcement of arbitration awards is now governed by the more restricted notion of *international public policy*.⁵⁷⁶ Hence interference by states with arbitration awards is limited to upholding the 'most basic notions of morality and justice',⁵⁷⁷ and consequently refusal of enforcement is relatively rare.⁵⁷⁸ It is precisely because of the limited interpretation of public policy that the New York Convention has facilitated the recognition and enforcement of awards. In this way, arbitration has overcome the limitations of Private International Law and hence has proven to be more effective in the resolution of cross-border disputes than litigation. It should also be pointed out that, in any case, the enforcing court need not slavishly refuse enforcement if one of the grounds listed in Article V applies, as is clear from the wording of subparagraphs (1) and (2): 'recognition and enforcement *may be* refused' and the burden of proof that the award should not be enforced sits with the party resisting enforcement. This further strengthens the New York Convention's leaning in favour of enforcement. Hence, the New York Convention has had the

⁵⁷⁴ Art.II

⁵⁷⁵ Art.III

⁵⁷⁶ JDM Lew et al fn 270 721 Fn 173, 726-728

⁵⁷⁷ *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)* 508 F2d 969 (2nd Cir 1974) 974

⁵⁷⁸ JDM Lew et al fn 270 724, 726

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dual effect of harmonising the standards for the enforcement of awards and making such enforcement easier.⁵⁷⁹

The question here is to what extent the New York Convention is a source of law for *due process*. From one perspective one could say that the Convention limits due process in international commercial arbitration in that it potentially restricts the courts of the Contracting States to refuse enforcement on the basis that due process has not been complied with by the foreign arbitral tribunal. However, looking at the grounds listed in Article V and in particular Article V (1) (a)⁵⁸⁰, (b)⁵⁸¹, (d)⁵⁸² and Article V (2) (b)⁵⁸³, they are sufficiently wide to include various aspects of due process considerations. Article V (1) (b) is the main provision in this respect, as it allows refusal of recognition and enforcement where ‘the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case’. Hence for most cases on due process it will not be necessary to invoke public policy. For example, in the case of *Generica Ltd v Pharmaceuticals Basics Inc* the US Federal Appeal Court of the 7th Circuit held that the ground for refusal in Article V (1) (b) corresponds to the general due process requirements under US law, consisting of ‘adequate notice, a hearing on the evidence and an impartial decision by the arbitrator’.⁵⁸⁴ This acknowledgment of the significance of due process in the New York Convention, and the subsequent interpretation of this Article by national court decisions is an important source for the international law aspects of arbitration.

⁵⁷⁹ JDM Lew et al fn 270 693

⁵⁸⁰ Invalid arbitration agreement

⁵⁸¹ Party not given proper notice or unable to present its case

⁵⁸² Arbitral authority or procedure not in accordance with the agreement of the parties or the law of the seat

⁵⁸³ Public policy of the enforcing state

⁵⁸⁴ XXIII YBCA 1076 (1998) 1078-9, 125 F3d 1123, 1129-1130 (7th Cir 1997), also in *Parsons & Whittemore Overseas Co Inc v Société Générale de l’Industrie du Papier (RAKTA)* 508 F2d 969, 975-6 (2nd Cir 1974), where the Second Circuit said that ‘this provision essentially sanctions the application of the forum state’s standards of due process’ 975. This is not in contradiction to the earlier finding that the due process requirements in the US Constitution do not apply to arbitration, as here the courts are dealing with the interpretation of the NYC and only using constitutional due process by way of analogy, *ie* the argument is not about whether arbitration is state action but what the concept of due process means.

2.7 Conclusion

This section has discussed the following sources of law for due process: contractual provisions and rules of arbitral institutions, national arbitration laws, the common law, human rights law and the New York Convention and international public policy. These sources of law are both of a public and private origin and have a national and international dimension. As we have seen, human rights law has not had much influence in forming due process in arbitration and most impulses for due process stem from national arbitration laws, the arbitral rules and the interpretation of the provisions of the New York Convention by the courts. The following sections contain a comparison of due process in litigation with due process in arbitration.

3. Impartiality and Independence in Adjudication

As explained at the outset, the purpose of this Chapter is to draw up the requirements of due process and discuss how they are applied to arbitration proceedings. This involves a discussion of constituent elements of due process, such as the impartiality and independence of the adjudicator(s), fair hearing, the duty to give reasons, transparency and the right of appeal.

3.1 Impartiality and independence of judges

The first principle of common law due process, that no person shall be a judge in his or her own cause, means that an adjudicator in judicial or quasi-judicial proceedings should be impartial *and* independent.⁵⁸⁵ This distinction between impartiality on the one hand and objective independence has also been maintained by the Strasbourg institutions in their rulings on Article 6 (1) ECHR.⁵⁸⁶

⁵⁸⁵ SH Bailey et al fn 480 280, 1315

⁵⁸⁶ See eg *Pullar v UK* (1996) 22 EHRR 391 (ECtHR) 402-403

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This section discusses the traditional approaches to allegations of a *judge's* bias under the English common law, and the next section will discuss how these principles have been applied to *arbitrators*, both under the common law and arbitration specific legislation and rules.

3.1.1 Defining impartiality and independence

Impartiality in the context of judicial decision-making has been given the meaning (subjective) 'absence of actual bias', whereas independence has been taken to mean (objective) 'absence of appearance of bias', or in more modern terminology, 'absence of a relevant conflict of interest' under the English common law.

(a) Impartiality (no actual bias)

Partiality or actual bias relates to the adjudicator's internal prejudices, prejudgment or predisposition towards one of the parties or the subject-matter of the dispute. Thus, partiality or actual bias is an abstract, *subjective* requirement referring to the judge's state of mind.

Partiality or bias means having an inclination for or against a party taking into account irrelevant considerations and acting either out of self-interest or prejudice. *Galligan* emphasizes the element of prejudging by a biased judge:

'The idea of prejudice as pre-judgment brings out well the core idea that to be biased is in some way to have judged the issue beforehand or to have judged it for reasons which are not the right reasons.'⁵⁸⁷

An allegation of partiality or actual bias would involve an examination of the subjective state of mind of the judge, which causes obvious problems of evidence, and would be a serious allegation against the judge. Hence, in practice, partiality or

⁵⁸⁷ DJ Galligan fn 52-438

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actual bias is notoriously difficult to prove and therefore a challenge of a ruling on these grounds has never been successful under English law.

(b) Independence (no appearance of bias)

Because of this evidentiary concern, the courts have added the second requirement that judges must also be independent, and this second criterion of independence goes some way towards effectuating an absence of actual bias. Hence in practice, the requirement that judges are independent is more important.

Independence is a factual concept, in that it means absence of an objectively ascertainable conflict of interest.⁵⁸⁸ In the context of judicial decision-making in the English courts, the requirement is usually expressed as an absence of the appearance of bias or in more recent decisions, an absence of conflicts of interest. This requirement is infringed where the adjudicator has a relevant conflict of interest.

However the question of what amounts to a relevant conflict of interest clearly is a *question of degree*- if the slightest possibility of bias were to be sufficient for a finding of non-independence, it would be difficult to find any adjudicator for many cases.⁵⁸⁹ To answer this question it is necessary to assess the risk of possible prejudice.

3.1.2 Independence and the relevant risk assessment

Looking at the risk assessment from a more abstract point of view, the risk of bias depends on how directly the interest (or other predisposition) relates to the parties or subject-matter of the decision to be made and how important the outcome is for

⁵⁸⁸ DJ Galligan fn 52 438; G Kaufmann-Kohler, T Schultz fn 224 112; A Jaksic fn 491 253-254; A Redfern, M Hunter fn 270 238-239; JDM Lew et al fn 270 258, 260

⁵⁸⁹ MH Redish, LC Marshall fn 50 492 et sequi

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the judge.⁵⁹⁰ The test for this risk assessment has been succinctly expressed in the US Supreme Court case of *Tumey* where a relevant conflict of interest has been described as a 'possible temptation to the average man as a judge',⁵⁹¹.

Under the English common law the courts have made a distinction between conflicts of interest, which result in automatic disqualification of the judge (without further risk assessment) and conflicts of interest, which are subject to a risk assessment (under the 'appearance of bias' argument).

(a) Automatic disqualification: more serious conflicts

It has long been recognised by the English courts that a conflict of interest stemming from a financial interest in the subject matter of the dispute, such as shares in a company, may lead to automatic disqualification of the judge.⁵⁹² However, this has now been widened to include other personal (non-financial) interests: the seminal case in this area is *ex parte Pinochet Ugarte* case⁵⁹³, concerning extradition proceedings, in the course of which the House of Lords had to decide on the question of state immunity granted to the former Chilean head of state. Amnesty International had been granted leave to act as an intervener in the proceedings. It transpired after the ruling that one of the Law Lords, Lord Hoffmann, was a director of the charity arm of Amnesty International, and the defendant petitioned the House of Lords to set aside the decision. The House of Lords unanimously granted the petition on the basis that Lord Hoffmann's link with Amnesty International was such that he should have automatically been disqualified to sit in the case. In the *ex parte Pinochet Ugarte* case all five Law Lords held that there can be automatic disqualification of a judge, without having to show a real danger of bias, if the judge has a relevant interest in the outcome of the case.⁵⁹⁴

⁵⁹⁰ John R Allison J Allison fn 52 514-517

⁵⁹¹ See *Tumey v Ohio* 273 US 510 (1927) 522

⁵⁹² *Dimes v Grand Junction Canal* (1853) 3 HL Cas 759 (HL) 793, *R v Rand* (1866) LR 1 (QB) 230, 232

⁵⁹³ [2000] 1 AC 61

⁵⁹⁴ 133 (*Lord Browne-Wilkinson*): 'once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a

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Automatic disqualification obviates the need to show that the interest was such as to be liable to influence the judge's decision.⁵⁹⁵ Thus, the House of Lords extended automatic disqualification of a judge with a relevant interest to non-pecuniary interests. This immediately raises the question of what kind of non-pecuniary interest would lead to disqualification.

On this matter, *Lord Hutton* stated that

'I am of the opinion that there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as the shareholding (which might be small) in a public company involved in litigation'.⁵⁹⁶

In a similar vein *Lord Browne-Wilkinson* regarded the promotion of a cause of a party as a relevant interest.⁵⁹⁷ Thus it seems that post the *ex parte Pinochet Ugarte case*, the promotion of and strong commitment to a particular cause or an association with one of the parties of the proceedings are non-pecuniary grounds leading to automatic disqualification without any further inquiry into the likelihood of bias.

(b) Lesser conflicts: appearance of bias

Lesser conflicts of interest are subjected to a risk assessment. Generally speaking, conflicts of interest may stem from a relationship with a party (eg through friend-or-kinship) or from the adjudicator's promotion of a particular cause.⁵⁹⁸ Hence,

likelihood or suspicion of bias'; 139 (*Lord Goff*): 'the relevant interest need not be a financial interest';

145 (*Lord Hutton*)

⁵⁹⁵ 135

⁵⁹⁶ *ibid*

⁵⁹⁷ 135

⁵⁹⁸ SH Bailey et al fn 480 280,1315

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usually for a finding of lack of independence, an objectively ascertainable conflict of interest or predisposition ('apparent bias') is necessary.

The leading case for the requirement of absence of apparent bias is the famous 1924 case of *R v Sussex Justices, ex p McCarthy*. In this case, *Lord Hewart* made the famous dictum that it is 'of fundamental importance that justice should not only be done, but should be manifestly and undoubtedly be seen to be done'.⁵⁹⁹

In that case, a solicitor was acting as a magistrates' clerk in a criminal case relating to a dangerous driving charge and as solicitor for the plaintiff in the ensuing civil trial for damages against the same defendant. On the facts it was clear that he had not advised the magistrates and, hence, had not influenced the magistrates' decision to convict the defendant.⁶⁰⁰ Nevertheless the defendant's conviction was quashed for the appearance of bias. The logic underlying this decision is the difficulty of proving or disproving actual bias and that therefore, as a matter of policy, it is undesirable and unhelpful to even pose the question whether a person was in fact biased.⁶⁰¹ Even if one accepted that an appearance of bias was sufficient for challenging a decision, this still leaves open the question as to *how much* apparent bias is required before a decision is quashed. The case law after *Sussex Justices* was conflicting as to the likelihood of bias required, in particular some courts seemed to

⁵⁹⁹ *R v Sussex Justices* fn 55 259

⁶⁰⁰ Although one could argue that his mere presence could have influenced the magistrates, this is not a point that was argued by the Court

⁶⁰¹ *ibid*, see the explanation for the appearance of bias rule in *R v Gough* fn 486 (HL) 191 (*Lord Goff*): 202 (*Lord Woolf*). In more recent decisions the courts refer to unconscious bias rather than appearance of bias. see *Lord Justice Simon Browne* in the case *R v Inner West London Council, ex parte Dallaglio* [1994] 4 AllER 139 (CA) 152 said that the courts are 'no longer concerned strictly with the appearance of bias but rather with establishing the possibility there was actual although unconscious bias'; see also *AT&T Corporation v Saudi Cable Co* [2000] 2 Lloyd's Rep 127 (CA) 136 (*Lord Woolf*)

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state that a mere suspicion of bias was sufficient to create an appearance of bias⁶⁰², whereas others held that there must be a real likelihood of bias⁶⁰³.

This conflict was eventually resolved in favour of the latter concept by the leading House of Lords decision in *R v Gough*⁶⁰⁴. In that case one of the jurors in a criminal trial was the neighbour of the defendant's brother- albeit that she was not aware of this connection during the trial. *Lord Goff* stated that a mere suspicion of bias is not sufficient- there has to be a real danger of bias in the sense of a real possibility of bias.⁶⁰⁵ The only exception to this was where the judge had a financial interest in the outcome- in such cases bias is automatically presumed.⁶⁰⁶ Hence the courts now will look at the likelihood of bias rather than a mere theoretical appearance of bias.

In a similar vein, the ECtHR has held in a case where one of the jurors in a criminal trial was an employee of one of the main prosecution witnesses, that the applicant's doubts about the juror's impartiality must be objectively justified. The ECtHR said that in each individual case it had to be examined whether there was a real risk that the familiarity would taint the impartiality of the tribunal member. The ECtHR by a majority of five votes to four found that there had been no breach of Article 6 (1), since the juror had been employed in a junior position, had had no involvement in the project concerned and in fact had been made redundant before the trial.⁶⁰⁷

⁶⁰² *Lord Goff* in *R v Gough* fn 486 (HL) 194 pointed out that 'following the *Sussex Justices* case, there developed a tendency for courts to invoke a test requiring no more than a suspicion of bias', eg *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 (CA) 599, referring to the 'impression which would be given to other people' (*Lord Denning*). *Danckwerts LJ* and *Edmund Davies LJ* endorsed a reasonable suspicion of bias standard 601-602 and 606

⁶⁰³ *R v Camborne Justices ex p Pearce* [1955] 1 QB 41 (Divisional Court) 51-52; *R v Barnsley County Borough Licensing Justices, ex p Barnsley and District Licensed Victuallers Association* [1960] 2 QB 167, 186-187 (*Devlin LJ*)

⁶⁰⁴ 194

⁶⁰⁵ *ibid* 198

⁶⁰⁶ *ibid* 195, *Dimes v Grand Junction Canal* (1853) 3 HL Cas 759 (HL) 793, *R v Rand* (1866) LR 1 (QB) 230, 232; see also the US Supreme Court case of *Tumey v Ohio* 273 US 510, 522 (1927); J Allison fn 52 515-516 argues that this harsher treatment of financial bias can be explained by the fact that it is easier to prove than prejudice and because of the public's expectations- he argues that financial interests may in fact have less influence on a decision-maker than other interests. Of course in the UK the *ex parte Pinochet Ugarte* case has made clear that interests of a non-financial nature may also lead to automatic disqualification.

⁶⁰⁷ *Pullar v UK* (1996) 22 EHRR 391 (ECtHR) 405

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By way of summary, if the judge has a significant financial or other direct and personal interest in the outcome, he or she will automatically be disqualified—however such extreme cases, exemplified by the *ex parte Pinochet Ugarte* case, will be rare. In most cases the interest will be more indirect and less substantial, so that a risk assessment in relation to the conflict of interest must be undertaken and a judge's independence must be assessed by objective criteria. This is in conformity with the jurisprudence under the ECHR.

3.2 Impartiality and independence of arbitrators

Unsurprisingly, national arbitration laws⁶⁰⁸ and the rules of some of the most important arbitral institutions⁶⁰⁹ expressly provide that arbitrators must be independent and/or impartial. In addition, the rules of conduct governing the legal professions state that members of that profession must be impartial and independent and not advising any party when acting as arbitrators.⁶¹⁰ Furthermore, it is a recognised fundamental principle of international arbitration law that arbitrators should be both impartial and independent.⁶¹¹

Nonetheless, the application of this general principle causes problems when applied to the manifold situations of alleged bias in which arbitrators may find themselves.

⁶⁰⁸ Eg ss 24 (1) (a), 33 (1) (a) and 68 (2) (a) English Arbitration Act 1996; ss 1035, 1036 German Arbitration Act 1998; s.10 (a) (2) US Federal Arbitration Act 1925 ('evident partiality or corruption'); s.42 New South Wales Commercial Arbitration Act 1984; Arts 34, 58 (6) Arbitration Law of the People's Republic of China 1994; Art.18 (1) (ii) Japanese Arbitration Law 2003

⁶⁰⁹ ICC Rules Arts 7 (1) and 11 (1). AAA ICDR Art.7 (1). AAA Commercial Arbitration Rules Rules 17 (a) (i) and 16, LCIA Rules Art.5 (2). UNCITRAL Rules Art.9, WIPO Rules Art.22 (a)

⁶¹⁰ Rule 22.02 Law Society's Guide to the Professional Conduct of Solicitors, 8th edition 1999

⁶¹¹ A Redfern, M Hunter fn 270 236; JDM Lew et al fn 270 255-256; Part 1.1 IBA Guidelines of Conflicts of Interest in International Arbitration of 22. May 2004, available from http://www.ibanet.org/publications/IBA_Guides_Practical_Checklists_Precedents_and_Free_Materials.cfm [14. September 2007]

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3.2.1 The English Arbitration Act 1996 and the common law

Looking at English law and in particular, the English Arbitration Act 1996 in more detail, it provides, first of all, in section 1 (a) that ‘the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense’. Most importantly, section 24 (1) (a) entitles a party to apply to the court to remove an arbitrator, where circumstances exist that give rise to justifiable doubts as to his (or her) impartiality.⁶¹² Furthermore, section 33 provides that the tribunal shall act fairly and impartially as between the parties and non-compliance with this duty leaves any ensuing award open to challenge.⁶¹³ Although the English Arbitration Act 1996 does not refer to independence, but only to impartiality, the right to challenge an arbitrator under the 1996 Act includes circumstances, where the arbitrator cannot be considered to be independent, since an award can be challenged if there are objective circumstances that give rise to justifiable doubts as to the arbitrator’s impartiality. This wording includes objectively ascertainable conflicts of interest and the real danger of bias test established in *R v Gough*.

It has been long established that a private body, such as a sports club, may also be subject to the rules of natural justice, when making a decision affecting a member based on contract.⁶¹⁴ This paved the way for applying the same principles to private adjudicatory systems. *Lord Goff* in *Gough* stated that the same standard of real danger of bias applied to all persons acting in a judicial capacity whatsoever, whether they are adjudicating on the facts or on the law, *ie* judges, jurors, justices, tribunal members and arbitrators. *Lord Goff* has said *obiter* that the standard as to the likelihood of bias stemming from a conflict of interest is the same in arbitration and in court proceedings, *ie* whether there was a real danger of bias or a real

⁶¹² *Norbrook Laboratories v A Tank and Moulson* 2006 WL 1333300 (Comm)- arbitrator was removed because of bias after contacting witnesses direct. see para 156

⁶¹³ Under s.68 (1)

⁶¹⁴ *AT&T v Saudi Cable Co* [2000] 2 Lloyd’s Rep 127 (Comm) 138 (LJ Potter); *Wood v Woad* (1874) LR 9 Ex 190; *Calvin v Carr* [1980] AC 574 (PC) 596; *R (Irvine) v The Royal Burgess Golfing Society of Edinburgh* [2004] LLR 334 (Court of Session) para 25; G Flick fn 479 32-33

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possibility of bias.⁶¹⁵ *Lord Goff* approved of the test established in *The Elissar*⁶¹⁶ and *Bremer*⁶¹⁷ whether

‘the circumstances were such that a reasonable man would think that there was a real likelihood that the arbitrator would not fairly determine the issue on the basis of the evidence and arguments adduced before him’.⁶¹⁸

Furthermore, in the more recent case of *Laker Airways Inc v FLS Aerospace Ltd* Mr Justice Rix specifically held that the test in section 24 of the English Arbitration Act 1996 is congruent with the test of real danger of bias established in *Gough*.⁶¹⁹

Likewise, in the case of *AT&T v Saudi Cable Corporation*⁶²⁰ the Court of Appeal reiterated the dictum in *Gough* that the test for bias applied to courts and arbitration tribunals in the same manner, *ie* the relevant test is whether there was a *real* danger that the arbitrator would be unconsciously biased.⁶²¹

In the *AT&T* case the chairman of an arbitration panel was a non-executive director of Nortel, a competitor to one of the parties in the dispute, AT&T. The dispute arose from a bid for a Saudi telecommunications project, which had been won by AT&T, whereas Nortel had been an unsuccessful bidder. The main issue in this case was that the chairman was connected to a competitor of a party. AT&T was concerned about the risk of disclosure of confidential information to Nortel, in particular in view of future bids for Saudi projects. The Court of Appeal found that the fact that the arbitrator was a non-executive director of a competitor did not affect his independence and that there was no real danger of unconscious bias.⁶²²

⁶¹⁵ *R v Gough* fn 486 199- before the passing of the 1996 Act

⁶¹⁶ *Ardahalian v Unifert International SA (The Elissar)* [1984] 2 Lloyd’s Rep 84 (CA) 89 establishing an objective test to assess whether an arbitrator should be disqualified because of misconduct.

⁶¹⁷ *Bremer Handelsgesellschaft mbH v Ets Soules et Cie* [1985] 2 Lloyd’s Rep 199 (CA) 201

⁶¹⁸ *R v Gough* fn 486 199

⁶¹⁹ [1999] 2 Lloyd’s Rep 45 (Comm) 49

⁶²⁰ [2000] 2 Lloyd’s Rep 127 (CA)

⁶²¹ *ibid* 134-135 (Lord Woolf) and 138 (Lord Justice Potter)

⁶²² *ibid* 136 (Lord Woolf), 139 (Lord Justice Potter)

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Although the arbitrator's failure to disclose this interest to the parties at the outset did amount to a mishap in the procedure, the Court of Appeal denied that this was sufficient to set aside the award (particularly at this late stage after millions of pounds had been spent in the proceedings).⁶²³ The Court of Appeal agreed with the first instance judge's assessment that the arbitrator's position as non-executive director would not have involved him in operational decisions by Nortel and that it was therefore extremely unlikely that he would have disclosed any information, especially since such disclosure would have amounted to a serious breach of the arbitrator's duty of confidentiality. The chairman, given his experience and standing, would have been well aware of this duty.⁶²⁴

In summary, the courts have firmly established that the standards of impartiality and independence applied to arbitrators are equivalent to those applied to judges in the ordinary courts. As a matter of principle, the courts' insistence on equivalence is manifest.

3.2.2 Important differences between arbitrators and judges

Nevertheless, by insisting on this principle, the English courts have turned a blind eye to the fact that there are important differences between the role played by arbitrators and that by judges. It is argued below in this Chapter⁶²⁵ that there are important differences between judges and arbitrators and that the courts should acknowledge these differences by admitting that they apply⁶²⁶ a lower standard to arbitrators than to judges.

By contrast to the English position, in the leading US case on the issue of arbitrator impartiality the US Supreme Court has albeit *obiter* expressly recognised the difference between arbitrators and judges. In the US, section 10 of the Federal

⁶²³ *ibid* 138 (Lord Woolf), 140 (Lord Justice Potter), 141 (Lord Justice May)

⁶²⁴ *Ibid* 138

⁶²⁵ See the next section

⁶²⁶ See the discussion of the *Rustal* and *Bremer* cases below

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Arbitration Act allows vacation of the award only on the limited grounds of corruption, fraud, undue means or where there was *evident* partiality or corruption in the arbitrators and the legislation does not expressly mention appearance of bias or lack of independence. Hence it may seem at first sight that under federal arbitration law the test as to arbitrator bias is more restrictive and less protective than under the English common law.

However, the US Supreme Court, in the seminal *Commonwealth Coatings* case⁶²⁷ held that any tribunal whether it is a court of law or an arbitration tribunal must not only be unbiased but must also *appear* to be unbiased.⁶²⁸ The case concerned a claim for payment allegedly due for work carried out by a subcontractor against the prime contractor. The presiding arbitrator was an engineering consultant with a large business in Puerto Rico and he had had sporadic, but repeated business contacts with the prime contractor, generating fees of about US \$ 12,000 over a period of four to five years, albeit no dealings in the year preceding the arbitration. The Supreme Court decided that this business relationship between the arbitrator and one of the parties was sufficiently significant to raise an appearance of bias (even though no actual bias was alleged) and that, as a consequence, the award should be vacated.

Mr Justice Black who delivered the leading Opinion of the Court said⁶²⁹ that in principle the same, if not higher standard should apply to an arbitration tribunal compared to a court of law:

‘It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.’

⁶²⁷ *Commonwealth Coatings Corp v Continental Casualty Co* 393 US 145, 89 S Ct 337

⁶²⁸ *ibid* 150

⁶²⁹ *Ibid* 148-149

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By contrast the other two concurring judges, Mr Justice White and Mr Justice Marshall, found that arbitrators should not be held to the same standards as judges for the reason that

‘it is often because they are men of affairs, not apart from, but of the marketplace, that they are effective in their adjudicatory function (...) but it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed’.⁶³⁰

The dicta concerning the question whether the same, higher or less stringent standards should be applied to arbitrators than to judges were ultimately *obiter*, as the Court decided that in this case there was an appearance of bias. It is interesting that the Court was badly divided over the question, with Mr Justice Black considering that the same, if not higher standards should apply, whereas Justices White and Marshall held that the standards for arbitrators should be less stringent. This disagreement shows the difficulty of applying the same standards of impartiality and independence to arbitrators as those that apply to judges.

3.2.3 Arbitrators as men or women of business

Even though the courts in England have held arbitrators to the same standards as judges as a matter of law, the question arises to what extent is this possible *in practice*. It is argued here that, generally speaking, independence is more difficult to achieve in practice for arbitrators, as arbitrators are not civil servants or full-time adjudicators, unlike (most) judges, and earn their living through some kind of commercial activity.⁶³¹ Hence, they have business interests, which may conflict

⁶³⁰ Ibid 150, 152-153

⁶³¹ AS Rau fn 126 494-495

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with their adjudicatory role in some circumstances.⁶³² Arbitrators are frequently professionals or business people (such as lawyers, engineers, architects, surveyors, medical experts) and are chosen for the very reason of their knowledge and expertise in a given field.⁶³³

Conflicts may arise, in particular where specialist knowledge of a field is required, simply for the reason that the number of ‘insiders’, such as leading members of a particular trade association, or experts in the field, is limited. As a consequence, the arbitrators, the parties’ representatives, the parties’ expert witnesses and the parties themselves may have pre-existing relationships or connections. Furthermore, for an arbitrator working for a large professional practice, such as a law, accountancy or construction firm, it is likely that one of his or her partners or associates may have had a business relationship with or may even be acting for one of the parties to the dispute in an unrelated matter. With professional practices merging and increasing consolidation in professional sectors, it becomes increasingly difficult to avoid such conflicts of interests.

Two cases illustrate this point. In the first case, *Rustal Trading Ltd v Gill & Duffus SA*⁶³⁴, the arbitrator, a director of a sugar trading company, had previously been a party to a protracted and acrimonious dispute involving allegations of fraud with a consultant of the claimant, Rustal Trading Ltd. The consultant acted as an important witness for Rustal in the arbitration in question. However the Court found that this was insufficient to establish a real danger of bias, saying that there was no reason to suspect that the arbitrator would in fact be predisposed against the witness’ evidence.⁶³⁵ The Court pointed out that

‘if the arbitrators are themselves to be active traders there is every likelihood that at least one member of the tribunal will at some time have had commercial dealings

⁶³² JDM Lew et al fn 270 258

⁶³³ AS Rau fn 126 494-495

⁶³⁴ [2000] 1 Lloyd’s Rep 14 (Comm)

⁶³⁵ *ibid* 19

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with one or both parties to the dispute. (...) The fact that those dealings had on occasions given rise to disputes would likewise not of itself provide grounds for doubting an arbitrator's impartiality. Disputes are part and parcel of commercial life in general and commodity trading is no exception'.⁶³⁶

In a situation where a judge in an ordinary court had a pre-existing dispute with an important witness, this constellation would give rise to an appearance of bias, disqualifying the judge from sitting in the case. Because such a constellation is more likely to arise in the arbitration world, where arbitrators and expert witnesses share a common trading background, the courts seem to accept a lower standard regarding the question of appearance of bias.

In the second case used to illustrate the point, *Bremer*, the claimant sought to challenge the appointment of one arbitrator to an appeal panel. *Bremer* was a seller in one of the over 1000 GAFTA arbitrations arising from a US soya beans embargo. It argued that the arbitrator being a director of a company, whose parent company was a party involved in the soya beans embargo arbitrations, but allegedly as a buyer, there was a risk that the arbitrator may not be able to review the case without any bias. *Bremer* alleged that a precedent in favour of the buyers would be useful to the arbitrator's company, hence there was a conflict of interest giving rise to an appearance of bias. The Commercial Court and the Court of Appeal dismissed the complaint.⁶³⁷ The complaint failed on factual grounds, as the complainant was not able to show that the parent of the company, on whose board the arbitrator sat, was in fact buyer-oriented.⁶³⁸ But the Court of Appeal also said *obiter* that it found nothing objectionable about the fact that traders sit in arbitrations, as 'members of the Grain and Feed Trade Association are particularly concerned to have their disputes decided by arbitrators who were experienced both as arbitrators and above

⁶³⁶ *ibid* 18

⁶³⁷ *Bremer Handelsgesellschaft mbH v Ets Soules et Cie* [1985] 1 Lloyd's Rep 160 (QB); 2 Lloyd's Rep 199 (CA)

⁶³⁸ *ibid* 203

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all as traders in that particular trade'.⁶³⁹ Curiously, though, the Court of Appeal *obiter* approved the judge's finding that even if the parent company had been buyer oriented, there would have been no risk of bias, as there was no evidence of any significant pattern in the outcome of the previous soya bean arbitrations on which that particular arbitrator sat. This reasoning behind this is not entirely logical. as the question of patterns of previous arbitrations relates to a showing of *actual* bias, whereas the claimants tried to show merely an *appearance of bias*. If the courts had found that the arbitrator's interest was too remote and indirect in any case to give rise to a real risk of bias, then it would have followed the same standard as that applied to judges. Instead the Court of Appeal chose to emphasize that the arbitrator in the case was a trader and that this was not objectionable, thereby implicitly applying a different standard than that applied to 'ordinary' judges. Hence certain predispositions do not disqualify arbitrators unless they reach a high intensity and actually blind the arbitrator as to the factual findings and applicable law.⁶⁴⁰

The conclusion from these cases is that a lower standard of impartiality is applied in arbitration than in litigation.

3.2.4 Payment and the repeat player syndrome

First of all, arbitrators differ from judges in that they are paid by the parties, and not by the state, so that the arbitrator may, at least theoretically, be interested in repeated appointments. This is problematic, if the parties are involved in the appointment of the arbitrator and the arbitrator expects repeat 'business' from one of the parties but not from the other.⁶⁴¹ Lisa Bingham in her empirical study of 1998 comparing the statistics of non-repeat and repeat appointments of arbitrators by

⁶³⁹ *ibid* 204

⁶⁴⁰ W Park fn 40 132

⁶⁴¹ C Partasides 'International Commercial Arbitrations' in J Tackaberry, A Marriott *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (4th ed Sweet & Maxwell London 2003) 651-706, 687; AS Rau fn 126 524; E Thornburg 'Going Private: Technology, Due Process and Internet Dispute Resolution' 34 UC Davis Law Review (Fall 2000) 151-220, 208; LJ Gibbons 'Private Law, Public "Justice": Another Look at Privacy, Arbitration and Global E-commerce' (2000) 15 *Ohio State Journal on Dispute Resolution* 769-793, 780

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employers has clearly shown that employers are at an advantage over employees where they make repeat appointments.⁶⁴²

3.2.5 Appointment by the parties

Secondly, another, related issue in relation to independence is that in most cases, the parties appoint the arbitrator (s). If a panel of three arbitrators is appointed it is common practice that each party appoints one arbitrator and the third arbitrator is then appointed in some other manner (such as being appointed by agreement of the party-appointed arbitrators) as neutral chairman.

The function of each party-appointed arbitrator in international commercial arbitration is to ensure that the cultural, linguistic and legal background of that party is properly understood by the tribunal. Hence in the context of an arbitral tribunal with several arbitrators, it is necessary to distinguish between neutrality and impartiality. A party-appointed arbitrator is not neutral, but should act fairly and impartially as between both parties.⁶⁴³ This can cause problems where one party fails to appoint an arbitrator and the other party's appointed arbitrator acts as single arbitrator.⁶⁴⁴

By contrast, in domestic US arbitration the practice has been the reverse, in that a party-appointed arbitrator has been regarded as not independent from the appointing party and is acting more like a representative⁶⁴⁵. However US practice is being influenced by international practice to the contrary.⁶⁴⁶ The Code of Ethics jointly

⁶⁴² L Bingham fn 62 236-239; see also AS Rau fn 126 524

⁶⁴³ JDM Lew et al fn 270 258-259

⁶⁴⁴ See BGH III ZR 332/99 of 1. February 2001, albeit in that case the German courts nevertheless enforced the English award, as the opposing party should have challenged the award earlier before the courts at the seat.

⁶⁴⁵ AS Rau fn 126 497-498; A Redfern, M Hunter fn 270 237; JDM Lew et al fn 270 256 Subject to a duty not to mislead, harass the other party or engage in delaying tactics, the non-neutral arbitrator may be predisposed towards the appointing party, see Canon X A (1) ABA/AAA The Code of Ethics for Arbitrators in Commercial Disputes, Effective March 1, 2004 available from <<http://www.adr.org/Guides>> [14. September 2007]

⁶⁴⁶ W Park fn 40 9

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promulgated by the American Arbitration Association and the American Bar Association states that, as a general rule, party-appointed arbitrators should be impartial and independent, unless the parties or the governing rules state otherwise.⁶⁴⁷

There seems to be a consensus, at least in international arbitration, that party-appointed arbitrators should be impartial, even though the party-appointed arbitrator cannot be said to be entirely neutral. However as long as each party appoints an arbitrator and there is a neutral chairman, this should not be seen as lowering standards of due process.

3.2.6 Systemic bias

While bias is prohibited, doctrinal predisposition is a legal factor which an appointing party may take into account.⁶⁴⁸ Such predisposition may have an impact on fairness. Systemic bias may arise from an arbitrator belonging to a particular interest or stakeholder group or from repeat appointments by such a group⁶⁴⁹ or from the fact that one party appoints the arbitrator and pays for the procedure⁶⁵⁰.

Issues of systemic bias are extremely difficult to assess.⁶⁵¹ As *Lisa Bingham* has argued mere statistical win-lose analyses of an arbitrator's record are no indication of an individual arbitrator's bias.⁶⁵² However she posits that 'statistical analysis may be useful to explore questions of structural bias stemming from the nature of the rules governing arbitration'.⁶⁵³ She also points out that a substantive scanning of arbitration awards for systematic bias is difficult, as factual and legal accuracy are notoriously hard to measure.⁶⁵⁴

⁶⁴⁷ Under 'Note on Neutrality' and Canon X, The ABA/AAA Code of Ethics fn 645

⁶⁴⁸ W Park fn 40 9

⁶⁴⁹ E Thornburg fn 641 209

⁶⁵⁰ see also T Schultz fn 440 92-93

⁶⁵¹ E Thornburg fn 641 209

⁶⁵² L Bingham fn 62 245-246

⁶⁵³ L Bingham fn 62 253

⁶⁵⁴ *ibid* 257-258

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Systemic bias additionally refers to those leanings and propensities which *every* individual has, not because of a personal conflict of interest or a consciously adopted viewpoint, but as a result of belonging to a particular group or organisation or as a result of a particular attitude or predisposition. Hence systemic bias is caused by our outlook on life as influenced by our social background and milieu and this, of course, includes our work environment, professional training and membership of professional organisations.⁶⁵⁵ *Lon Fuller* tells the story of a three-judge court who had to adjudicate on the question whether the criminal offence of threatening serious bodily harm to another person had been committed. The accused was a sailor in the navy and the unrefuted witness statements showed that the accused had said to a fellow sailor: 'I'll stick a knife in your guts and turn it round three times'. *Lon Fuller* wryly remarks 'Two of the judges, who had spent their lives in genteel surroundings far from the waterfront, were with great difficulty persuaded by the third to acquit.'⁶⁵⁶

The arbitrator's professional or business background may mean that he or she belongs to a particular interest or stakeholder group influencing his or her view of a dispute, which favours one or the other party.⁶⁵⁷ This is clearly not a problem if the parties both belong to the same interest group (*eg* both are members of the same trade association) and possibly less so, if the interest group is not relevant to the dispute. Issues of systemic bias only arise, if there is a substantial power imbalance between the parties and the parties belong to two opposing interest groups, whose interests clash in the particular dispute under arbitration. In order to illustrate this argument, one could imagine an arbitrator who is a leading member of a consumer association adjudicating a consumer law dispute between a business and a consumer as sole arbitrator. Another example would be a member of an employers' federation

⁶⁵⁵ DJ Galligan fn 52 438; AS Rau fn 126 488- he argues that this is unavoidable; see also J Sternlight 'Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration' (Fall 1996) 74 *Washington University Law Quarterly* 637-712, 684-685

⁶⁵⁶ L Fuller fn 38 391

⁶⁵⁷ This type of conflict of interest is also possible for judges in extreme cases, see the *ex parte Pinochet Ugarte* case. However, because of arbitrators' involvement in commercial affairs, it is more likely that they belong to relevant interest groups

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sitting as sole arbitrator in an employment dispute. Similar constellations can be made out, eg IP rights holder-user of IP, doctor-patient dispute or accident insurance company-claimants' association in personal injury cases, where the arbitrator belongs to one of the interest groups (eg to the association of IP rights holders, the medical profession or an association of personal injury claimants). In such cases, where a dispute involves opposing interest groups, the potential for systemic bias should be reduced by ensuring a balanced composition of the tribunal, including representation of both stakeholder groups on the tribunal, with a neutral chairman.

Independence standards for arbitrators attempt to draw the minute line between allowing for the general expertise and knowledge of arbitrators but prohibiting specific conflicts of interest and providing for a balanced composition of arbitration tribunals. For example the *AAA/ABA Code of Ethics* expressly recognises that arbitrators may have a business/professional background and states: 'Arbitrators do not contravene this [Code] if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.'⁶⁵⁸

In commercial arbitration and other situations where there is no significant power imbalance between the parties and the parties have made a fully informed and voluntary decision to go to arbitration, this slight taint on arbitrators' independence is of less significance than in arbitrations where there is a power imbalance and/or one party had to agree to the arbitration clause in a non-negotiated contract.

However even in the context of commercial arbitration, *Alan Redfern* and *Martin Hunter* have pointed out that 'in the past there was probably too great an acceptance

⁶⁵⁸ AAA/ABA The Code of Ethics for Arbitrators in Commercial Disputes, Effective 1. March 2004, Under 'Comment to Canon I' fn 647 available from www.adr.org [14. September 2007]

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by the parties of manifestly dependent or biased arbitrators nominated by their opponents'.⁶⁵⁹

3.2.7 Disclosure

Some may say that the issue of conflicts of interest is dealt with in practice by disclosure.⁶⁶⁰ The arbitrator should disclose all matters which affect his independence from the parties or which could cause a conflict of interest.⁶⁶¹

In England, if the parties either expressly agree that the disclosed matters do not disqualify the arbitrator or omit to challenge the arbitrator after a disclosure, the prejudiced party has waived his or her right to challenge the appointment of the arbitrator. As a consequence, a party may challenge the award after it has been rendered only on the basis of lack of independence of the arbitrator, if this challenge is based on facts which the party did not know at the outset of or during the arbitration.⁶⁶²

This waiver doctrine would be in accordance with Article 6 (1) ECHR. In *Suovaniemi* the ECtHR held that 'the Contracting States enjoy considerable discretion in regulating the question on which grounds an arbitral award should be quashed, since the quashing of an already rendered award will often mean that a long and costly arbitral procedure will become useless and that considerable work and expense must be invested in new proceedings.'⁶⁶³

⁶⁵⁹ A Redfern, M Hunter fn 270 245; similar A Jaksic fn 491 256-257, A Samuel fn 501 414; *Khawar Qureshi* also points out that conflicts of interests have threatened the confidence in the arbitral process, K Qureshi 'Conflict of interest' (2004) 154 *New Law Journal* 1400-1401; R Reuben fn 128 984

⁶⁶⁰ R Reuben fn 128 1067, see also UNCITRAL Rules Art.9; ICC Rules Art.7 (2); LCIA Rules Art.5 (3)

⁶⁶¹ A Redfern, M Hunter fn 270 242; JDM Lew et al fn 270 265; see also *Commonwealth Coatings* *Commonwealth Coatings Corp v Continental Casualty Co* 393 US 145, 89 S Ct 337 149 (Mr Justice Black) and 151 (Mr Justice White); see also UNCITRAL Model Law Art.12: see also the Guidelines American Bar Association, Principle VI A (1)-(3) (a) and (b)

⁶⁶² S.73 (1) Arbitration Act 1996

⁶⁶³ *Suovaniemi and others v Finland* ECtHR Page 6 Admissibility Decision of 23. February 1999 No 31737/96 available from the HUDOC database; see also *Nordström-Janzen and Nordström-Lehtinen v the Netherlands* EComHR Admissibility Decision of 27. November 1996 No 28101/95 available from the HUDOC database

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By contrast, if the arbitration proceeds under the US Federal Arbitration Act, the award can only be challenged *ex post*, although the challenging party should express his or her objection to the appointment of the arbitrator, to make sure that that party has not waived his or her right to do so.⁶⁶⁴

However it is important to point out that the arbitrator's obligation to disclose does not solve the question of under what circumstances should an arbitrator step down because of a relevant conflict of interest. If the arbitrator does not consider the disclosed conflict to warrant resignation and only one of the parties challenges the independence of the arbitrator, the question of whether or not the arbitrator is disqualified must be decided by the institution administering the arbitration or, ultimately the courts⁶⁶⁵. The arbitrator's duty to disclose relevant conflicts of interest at the outset, while notably sensible, only has the effect that the issue of independence must be decided at an earlier stage in the arbitration, to avoid wasted costs and delay. It does not circumvent the question of standards of independence.

3.3 Conclusion

The conclusion here is that although in theory the English courts have pronounced that the same standards of impartiality and independence apply to arbitrators as to judges, the fact that arbitrators are part of a certain business community may in fact lead to the application of lower standards in respect of impartiality and independence.⁶⁶⁶ Hence the English courts' rhetoric betrays the fact that lower standards are applied. The fact that the courts do not expressly recognise the differences between arbitrators and judges means that they never had a chance to address the issues arising from these differences.

⁶⁶⁴ This is a gap in the US Federal Arbitration Act, see further A Redfern, M Hunter fn 270 249

⁶⁶⁵ Eg s.24 (1) (a) Arbitration Act 1996

⁶⁶⁶ This is similar to the findings in W Park fn 40 137

4. Fair Hearing

The second principle of natural justice provides for a fair hearing. At a minimum, it requires prior notice of a claim given to a defendant and the giving of a fair opportunity to each party to present his or her case to the decision-maker and rebut that of the opponent.⁶⁶⁷ These minimum requirements apply, in principle at least, to both litigation and arbitration⁶⁶⁸. The purpose of the fair hearing principle is to ascertain what happened between the parties (fact-finding) and to evaluate these facts according to the applicable law.⁶⁶⁹ As has been discussed in Chapter Two, the two main elements of fairness are equal treatment and rationality and this is reflected in the fair hearing principle.⁶⁷⁰

4.1 Prior notice

Notice in good time⁶⁷¹ before the proceedings gives the defendant knowledge in advance of the considerations, which, unless challenged, may lead to an adverse decision.⁶⁷² Therefore an explicit disclosure of the ‘substance of the matters on which the decision-maker intends to proceed’ is central to the maxim.⁶⁷³ Hence a party must be given adequate notice of any hearings in arbitration.⁶⁷⁴ In addition, a party should properly be informed of the appointment of the arbitral tribunal.⁶⁷⁵

In the recent case of *Bernuth Lines Ltd v High Seas Shipping Ltd* the Commercial Court found that a notice of arbitration (and other arbitration documents) sent to the

⁶⁶⁷ *R (Irvine) v The Royal Burgess Golfing Society of Edinburgh* [2004] LLR 334 (Court of Session) para 33; *Calvin v Carr* [1980] AC 574 (PC) 597; see also the US Supreme Court case *Joint Anti-Facist Refugee Committee v McGrath* 341 US 123 1950 171-172: ‘notice of the case and an opportunity to meet it’

⁶⁶⁸ S.33 (1) (a) English Arbitration Act 1996, see also for example Recommendation 98/257/EC

⁶⁶⁹ *W Park* fn 40 45 also see the discussion in Chapter 2

⁶⁷⁰ 2-2 and 2-3.2 and 2-4

⁶⁷¹ *R v Thames Magistrates’ Court ex p. Polemis* [1974] 2 Lloyd’s Rep 16, 19

⁶⁷² *G Flick* fn 479 51, *HJ Friendly* fn 33 1280; Art.V (1) (b) NYC

⁶⁷³ *Lord Mustill* in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 (HL) 560

⁶⁷⁴ J Tackaberry, A Marriott ‘General Principles’ in J Tackaberry, A Marriott fn 641 160-161

⁶⁷⁵ A Redfern, M Hunter fn 270 491

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email info@hernuth.com had been validly served on the respondents.⁶⁷⁶ The respondents had not in fact realised that arbitration proceedings were being held until they received a copy of the award in the post. The respondents used this email address for marketing and clerical purposes and stated that they received a large amount of spam emails for this email address and hence had overlooked the emails pertaining to the arbitration. The Commercial Court refused to set aside the award, since this email appeared on the respondents' website and since the respondents had entered this email in the Lloyd's Maritime Directory as their email address.⁶⁷⁷ This argument is dubious, as it seems entirely reasonable that the respondents did not expect to receive important legal documents in an email account, which by its very name seems to suggest that it was for inquiry purposes only. For litigation, CPR 6.2 (1) (e) and Practice Direction CPR 6 make clear that electronic service is only valid where a party has agreed to such service in writing beforehand and has specified an email address for this purpose.⁶⁷⁸ In relation to arbitration the Commercial Court expressly stated that these provisions are not the applicable benchmark, as here the parties are businessmen and/or legally represented, so that any recognised means for effective business communication could be used for service.⁶⁷⁹ This case is interesting as it makes clear that a lower standard of notice applies to arbitration than to litigation.

4.2 Opportunity to present one's case and rebut that of the other party-fair hearing in a narrower sense

4.2.1 Fair hearing -the principle

The notion of a fair hearing under the common law has been shaped by the adversarial procedure. The basic principle of a fair hearing under the common law can be formulated summarily as follows: each party must be given a fair and equal

⁶⁷⁶ [2005] EWHC 3020 (Comm) Para 34

⁶⁷⁷ Para 34

⁶⁷⁸ Para 3.1

⁶⁷⁹ Para 28; S.76 (1) Arbitration Act 1996 stipulates that the parties are free to agree the method of service and s.76 (3) that any effective means of service will do

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opportunity to argue his or her case, both as to matters of fact and law and each party should also have a right to react to and rebut the submissions of the other party.⁶⁸⁰

In theory, under an adversarial procedure, each party should be able to gather as much evidence as possible, have access to all the documents through disclosure and adduce pertinent evidence. Furthermore, in theory, each party has a right to call witnesses, including relevant experts and to cross-examine the witnesses of the opponent.⁶⁸¹

Clearly in other jurisdictions, the inquisitorial approach with the tribunal taking a more active approach in calling evidence (and deciding which evidence is to be called) may epitomize the concept of a fair hearing.⁶⁸² However in civil law systems the maxims of *droit de la defense* and the *principe du contradictoire* are imposing similar requirements as the English maxim of fair hearing, *ie* the parties must have an opportunity to comment on and challenge each piece of evidence and each argument.⁶⁸³

For example in *Paklito v Klockner East Asia Ltd* it was alleged by the claimant attempting to enforce a CIETAC award in Hong Kong that under an inquisitorial system there is no need to allow any cross-examination of an expert, since the expert is appointed by the tribunal. The Supreme Court of Hong-Kong disagreed and concluded, after hearing expert evidence on the questions of Chinese procedural law and the practice of CIETAC that even under an inquisitorial

⁶⁸⁰ G Flick fn 479 69

⁶⁸¹ HJ Friendly fn 33 1282-1286

⁶⁸² Although it seems that there might be a general perception by the parties taking part in the dispute resolution that the adversarial procedure is fairer, as it allows the parties more control. This is the outcome of a 1978 study, which showed the same perception among common law (England, US) and civil law countries (Germany, France): E A Lind, BE Erickson, N Friedland, M Dickenberger 'Reactions to Procedural Models for Adjudicative Conflict Resolution: A Cross-National Study' (1978) 22 (2) *Journal of Conflict Resolution* 318-341, 335

⁶⁸³ A Redfern, M Hunter fn 270 491

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procedure the parties have a right to comment on the reports of the tribunal appointed experts.⁶⁸⁴

4.2.2 Amorphous nature of the requirements of fair hearing

A multitude of different procedural rights can be squeezed under the notion of a fair hearing- basically every aspect of a party presenting or adducing evidence or law before a tribunal can be enshrined in the principle.

However, it is important to emphasize that not every restriction of a party in the conduct of his or her case necessarily amounts to a breach of that person's right to a fair hearing. The detailed requirements vary according to the nature of the tribunal and the courts' appraisal of what is appropriate in the circumstances.⁶⁸⁵ So there is clearly a correlation between the nature of the tribunal and the issues at stake on the one hand and the fair hearing requirements on the other hand. To give a blatant contrast, a small claims court or consumer arbitration tribunal will use different standards than a criminal court in a murder trial.

In *R v Commission for Racial Equality ex parte Cottrell & Rohon*⁶⁸⁶, Lord Lane CJ said that there are degrees of justice depending on the nature of the hearing and the seriousness of the penalties, which can be imposed.⁶⁸⁷ He compared the rules of natural justice to an 'an unruly horse' and said that 'there is no doubt that what may be the rules of natural justice in one case may very well not be the rules of natural justice in another'.⁶⁸⁸ In this case, the Court found that the defendant in an investigation by the Commission for Racial Equality had no right to cross-examine

⁶⁸⁴ XIX YBCA 664, 666 (1994)

⁶⁸⁵ DJ Galligan fn 52 198; G Flick fn 479 47; SH Bailey et al fn 69 1315; *R v Commission for Racial Equality ex parte Cottrell & Rohon* [1980] 3 AllER 265 (QB) 271-273; *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 (HL) 560; *R (Irvine) v The Royal Burgess Golfing Society of Edinburgh* [2004] LLR 334 (Court of Session) para 29

⁶⁸⁶ *R v Commission for Racial Equality ex parte Cottrell & Rohon* [1980] 3 AllER 265 (QB) 271-273

⁶⁸⁷ *ibid* 271-273

⁶⁸⁸ *ibid* 272

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the witnesses on whom the Commission was relying for its findings.⁶⁸⁹ *Lord Lane CJ* cited⁶⁹⁰ a passage in the judgment of *Diplock LJ* in *R v Deputy Industrial Injuries Comr, ex parte Moore* who had said that

‘technical rules of evidence form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined (...) It means that he must not spin a coin or consult an astrologer; but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above.’⁶⁹¹

Due process is a flexible principle whose precise meaning frequently can only be ascertained on a case-by-case basis.⁶⁹²

For example the right to a fair hearing does not necessarily mean that it involves a right to make representations in person during an oral hearing and, hence, the parties may be limited to written submissions.⁶⁹³ Under the jurisprudence of the ECtHR, the right to a public hearing in Article 6 of the ECHR normally requires an oral hearing in proceedings of a court or tribunal of first and only instance.⁶⁹⁴ However, in appeal proceedings there may be less need for an oral hearing, if the appellant has had an oral hearing at first instance and if the appeal only raises legal issues.⁶⁹⁵ The right to an oral hearing has also recently been considered by the Court

⁶⁸⁹ See also HJ Friendly’s comment fn 33 about administrative tribunals: ‘in many such cases the main effect of cross-examination is delay 1285

⁶⁹⁰ *R v Commission for Racial Equality ex parte Cottrell & Rohon* [1980] 3 AllER 265 (QB) 272

⁶⁹¹ [1965] 1 AllER 81 (CA) 94; This is the rationality element of fairness, discussed in Chapter 2

⁶⁹² *W Park* fn 40 51

⁶⁹³ *R (Irvine) v The Royal Burgess Golfing Society of Edinburgh* [2004] LLR 334 (Court of Session) para 33; G Flick fn 479 14-15; HJ Friendly fn 33 1270

⁶⁹⁴ *Ekbatani v Sweden* (1991) 13 EHRR 504 (ECtHR) 511; *Helmens v Sweden* (1993) 15 EHRR 285 (ECtHR) 293-294; *Fischer v Austria* (1995) 20 EHRR 349 (ECtHR) 364; *Regina (Hammond) v Secretary of State for the Home Department* [2005] 3 WLR 1229 (HL) 1237-1238

⁶⁹⁵ *ibid*

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of Appeal in the case of *BLCT Ltd v J Sainsbury Plc*⁶⁹⁶. In this case *LJ Arden* said that there is no general presumption under English law and Article 6 of the ECHR that there should always be an oral hearing before a court. He found that whether or not an oral hearing is required depends on the nature of the application and in particular whether factual issues or such issues as the credibility of witnesses are at stake.⁶⁹⁷

Furthermore, in some proceedings it is indeed appropriate to curtail the quantity and quality of evidence, by imposing restrictions on expert evidence and cross-examination to reduce the cost and delay of proceedings.

Therefore, the full gamut of procedural protections adopted in adversarial criminal and civil trials is not always required in quasi-judicial and more informal proceedings. In summary, for any court or tribunal, the procedure adopted depends on the importance of the issues at stake, the value of the claims and the complexity of the issues involved.⁶⁹⁸

4.2.3 Fair hearing in arbitration

Returning to the more specific question of fair hearing in arbitration, as has been pointed out above, the principle that each party must be given a reasonable opportunity of putting his or her case and dealing with that of her opponent is well established.⁶⁹⁹ For example, Article 34 (2) of the UNCITRAL Model Law an action for setting aside the award may be brought where 'the aggrieved party was not given proper notice of the appointment of the arbitral tribunal or the arbitral

⁶⁹⁶ [2004] 2 P&CR 3 (CA)

⁶⁹⁷ Para 37

⁶⁹⁸ DJ Galligan fn 52 204. *R v Commission for Racial Equality ex parte Cottrell & Rohon* [1980] 3 AllER 265 (QB) 271-273; *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 (HL) 560; *R (Irvine) v The Royal Burgess Golfing Society of Edinburgh* [2004] LLR 334 (Court of Session) para 29

⁶⁹⁹ S.33 Arbitration Act 1996; A Redfern, M Hunter fn 270 490

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proceedings or was otherwise unable to present its case or where the award is in conflict with the public policy of the state where the arbitration takes place'.⁷⁰⁰

A good example of how the principle of fair hearing has been applied in international arbitration is the US case of *Iran Aircraft Industries v Avco*. In that case, the United States Court of Appeals for the Second Circuit refused to enforce an award by the Iran-US Claims Tribunal on the basis that the US company had been denied an opportunity to present its case. The Tribunal had agreed at a pre-hearing conference that the US company would be allowed to present a summary of 'kilos and kilos of invoices' produced by an independent audit. Later the Tribunal dismissed the US company's claim for the reason that the evidence was insufficient. The US courts refused to enforce the award on the basis that the claimant had been denied an opportunity to present its claim, as the Tribunal had unwittingly misled the claimant as to the evidence to be presented.⁷⁰¹

However, it is also apparent that the courts are slower to interfere with awards rendered by private bodies. In *Calvin v Carr* Lord Wilberforce expressly stated that

'While flagrant cases of injustice, including corruption or bias, must always be firmly dealt with by the courts, the tendency (...) should be to leave these to be settled by the agreed methods without requiring the formalities of judicial processes to be introduced.'⁷⁰²

In arbitration it is possible for the parties to cut the cost and delay of adversarial processes in various ways and limit the admissibility to the most relevant material.⁷⁰³ The parties (or the institutional rules, by default) can, for example, restrict the length of the written party submissions by a word limit, limit or forego disclosure, restrict the evidence adduced, renounce an oral hearing or cross-

⁷⁰⁰ See also Art.V (1) (b) NYC

⁷⁰¹ 980 F2d 141 (2nd Cir 1992), XVIII YBCA 596, 601-602 (1993)

⁷⁰² [1980] AC 574 (PC) 593

⁷⁰³ M Kurkela fn 528 185

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examination, proceeding exclusively by written submissions⁷⁰⁴, or conversely, limit themselves to an oral procedure. They can limit the time allowed to prepare the case. Furthermore it is possible to restrict the number of witnesses and in particular expert witnesses⁷⁰⁵, or decide not to call witnesses at all. Frequently arbitrators appoint experts according to a secret, non-transparent procedure. Furthermore, they can adopt a more inquisitorial approach, where the witnesses are not examined by the parties, but where the tribunal takes greater control of the procedure, decides which witnesses to hear (and not to hear), and puts the questions to the witnesses, if any.

Likewise in the US, the courts have stated that although the arbitration hearing must be fair and comply with the basic notions of due process, the parties should not expect the same procedures as they would find in a court.⁷⁰⁶ For example in *Generica Ltd v Pharmaceutical Basics* case the US Court of Appeals for the Seventh Circuit found that where the arbitrator had been given a discretion in the terms of reference what evidence to admit, a refusal to allow a cross-examination on a point, which the tribunal considered to be irrelevant, was not an infringement of due process.⁷⁰⁷

The US Court of Appeals for the Second Circuit held that an award was enforceable and that due process under Article V (1) (b) of the New York Convention had been complied with, even though one of the plaintiff's main witnesses had been unable to attend the arbitration hearing. The Court found that the 'inability to produce one's witness before an arbitral tribunal' was a risk 'inherent' in arbitration. By agreeing

⁷⁰⁴ Under s.34 (1) and (2) (h) English Arbitration Act 1996, there is no right to an oral hearing, neither party can insist on an oral hearing. If the parties cannot agree, the tribunal has a discretion to decide whether an oral hearing should be held. Contrast this position with Art.24 (1) UNCITRAL Model Law on International Commercial Arbitration 'unless the parties have agreed that no hearings shall be held the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party'. US Federal Courts have also held that the failure to conduct an oral hearing, violates a party's due process rights: *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKT)* 508 F2d 969 (2nd Cir 1974)

⁷⁰⁵ *Eg Egmatra AG v Marco Trading Corporation* [1999] 1 Lloyd's Report 862, 866

⁷⁰⁶ *Generica Ltd v Pharmaceutical Basics Inc* XXIII YBCA 1076 (1998) 1078-9, 125 F3d 1123, 1130 (7th Cir 1997)

⁷⁰⁷ *ibid* 1129-1130

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to arbitration the party had relinquished its right to have a subpoena against a witness to secure attendance. It had not been unreasonable of the tribunal to refuse to reschedule the hearing since the witness could not attend, considering that parties, counsel and arbitrators are frequently ‘scattered about the globe’ in such arbitrations.⁷⁰⁸ It was sufficient for due process that the witness had supplied an affidavit with his evidence in chief.⁷⁰⁹

Hence in arbitration restrictions of the traditional, adversarial notion of a fair hearing is common. Arbitrators should merely provide each party with a fair opportunity to present his or her case and answer that of the opponent. Unlike the procedural rules in court, the procedure followed in arbitration need not be proportionate to the risks involved, so that even a factually complex case can proceed without disclosure, without expert witnesses or even without a hearing.

(a) Party autonomy, flexibility and fair hearing

When contrasting the procedural requirements for a fair hearing in litigation and arbitration, one fundamental difference becomes immediately apparent: proceedings before an ordinary court are governed by rules on civil procedure with little or no influence by the parties. These rules must comply with certain minimum standards. By contrast, arbitration procedure, is largely determined by the parties⁷¹⁰, the institution (unless it is an *ad hoc* arbitration) and/or the tribunal. This principle of party autonomy is fundamentally important in arbitration and allows the parties to decide, if they can agree, how to conduct the arbitration process.

Since there are, in the case of *ad hoc* arbitration none, and in the case of institutional arbitration, only some, predetermined rules and processes, it is difficult to define a set of minimum standards for a fair hearing in arbitration. As all depends

⁷⁰⁸ *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)* 508 F2d 969, 975 (2nd Cir 1974)

⁷⁰⁹ *ibid* 976

⁷¹⁰ A Redfern, M Hunter fn 270 315

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on the parties' agreement, and, in the absence of that agreement, on the tribunal's discretion⁷¹¹ as to how to proceed, the parties have effectively waived many of the procedural protections. The principle of party autonomy means that, if both parties agree, they can renounce procedural protections, such as the ability to adduce expert evidence, even where the case is complex and such evidence would have normally been adduced in equivalent civil proceedings.

Furthermore in international arbitration, the proceedings may be linked to more than one jurisdiction, which makes the definition of what amounts to a fair hearing in international arbitration even more nebulous, as the concept is subject to variations in different legal systems and subject to cultural expectations⁷¹² (*eg* in relation to such questions as to whether the parties contact the witnesses prior to the trial and the question of whether the parties can appear as witnesses to name but a few examples). Plenty of procedural questions arise, to which a clear answer is frequently lacking.⁷¹³ In international arbitration, procedural practices that are entirely regular in one legal culture may be regarded as unethical or illegal in another. If such conflicts have to be solved in a concrete arbitration case, it is more likely that the arbitrator's choice of procedure is regarded as illegitimate. Hence to safeguard procedural integrity a formulation of baseline procedural rules may be required.⁷¹⁴

(b) Equal treatment and rationality as the outer boundaries

The only limitation on the principle of party autonomy is the principle of equal and rational treatment of the parties.⁷¹⁵ Hence as a bare minimum an arbitration

⁷¹¹ S.34 Arbitration Act 1996

⁷¹² A Jaksic fn 491 230, 235; W Park fn 40 51

⁷¹³ W Park fn 40 45

⁷¹⁴ W Park fn 40 60-61

⁷¹⁵ A Redfern, M Hunter fn 270 317-318

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procedure must treat the parties equally and must use a rational method for fact-finding and applying the law⁷¹⁶.

If the tribunal or the institution instigated a procedure which seriously limited *one* party's opportunities to present his or her case, then the courts would be likely to set aside the award or refuse enforcement for infringement of the equal treatment principle. Therefore it is important for the tribunal to ensure that procedural rules do not unfairly discriminate against one party. Furthermore if a tribunal chose a procedure which was irrational, for example relying on pure chance (such as throwing a dice or drawing a straw) then it could also be said that the procedure is unfair.

However, the parties themselves could in principle agree procedural rules, even if they were discriminatory or irrational, but only if they were not doing so inadvertently. In other words, the parties could waive their right to equal treatment or rationality, provided that this waiver is given voluntarily, without undue influence and provided each party is fully aware about the consequences.⁷¹⁷

Since arbitration tribunals have rarely, if ever applied irrational procedures, the more important question in practice is equal treatment.

By way of example, the equal treatment principle means that any hearing dates should be fixed at a date and place which is roughly equally convenient for either party.⁷¹⁸ Likewise deadlines or word-limits⁷¹⁹ which are too tight for one party only, or the use of technology⁷²⁰, which is inaccessible for one party, may be a breach of the principle of equal and fair treatment.⁷²¹

⁷¹⁶ Most writings on this issue emphasize the equal treatment aspect, probably for the reason that rationality is taken for granted.

⁷¹⁷ See 6-2.5, 7-2

⁷¹⁸ J Tackaberry, A Marriott fn 674 161

⁷¹⁹ *ibid*

⁷²⁰ J Hörmle 'Online Dispute Resolution' fn 641 794

⁷²¹ A Jaksic fn 491 244

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Equal treatment here refers to an equal opportunity to present a party's case. It does not necessarily mean that each party should be treated exactly the same⁷²², for example being able to call exactly the same number of witnesses. The ability to call witnesses should depend on the relevance of the evidence to that party's case. However the principle of equal treatment would be infringed, if *eg* only one party was allowed to call witnesses, or if one party was allowed to cross-examine the other party's witnesses, but not the other or, if only one party was able to benefit from disclosure of the other party's documents.

This is exemplified by the ECtHR case of *Dombo Beheer*⁷²³ (although this case concerned judicial proceedings before the Dutch courts). A Dutch company brought civil proceedings for breach of an oral contract for an extension of a loan, concluded by the manager of the company and the branch manager of a bank. Because of a rule in Dutch civil procedure, which disallows the parties from appearing as witness on their own behalf, the manager of the company was not allowed to testify as to the content of the contract, whereas the branch manager could as witness for the bank. The ECtHR found that there had been a breach of the right to a fair hearing, since the equality of arms principle had been infringed. The Court held that each party had to be given a reasonable opportunity to present its case, including evidence under conditions that do not put it at a significant disadvantage *vis-à-vis* its opponent.⁷²⁴ While the right to a fair hearing has never been defined by the Strasbourg organs and the contents of the right are open to be determined according to the circumstances of each individual case, this formulation of the equality of arms principle is the closest the Court (and formerly the Commission) has ever come to describing the right to a fair hearing *in abstracto*.⁷²⁵

The principle of equal treatment also means that both parties must have equal access to all documents and other evidence. Consequently some opportunity should

⁷²² G Petrochilos fn 501 145

⁷²³ *Dombo Beheer BV v Netherlands* (1994) 18 EHRR 213 (ECtHR)

⁷²⁴ *ibid* 229-230

⁷²⁵ A Jaksic fn 491 227

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be given to each party to acquaint itself with and comment on the observations as to law and fact made by any other party.⁷²⁶

This also means that the arbitrator should not engage in *ex parte* communications. The arbitrator should never discuss the case with only one of the parties or a witness in the absence of the other party. This rule against *ex parte* communications also means that any written communications should always be copied to the other party, even where they concern trivial administrative matters.⁷²⁷

Because of the principle of fair and equal opportunity to argue one's case, the adjudicator's decision should only be based on the evidence presented.⁷²⁸

Arbitrators are frequently chosen for their expertise in a particular field and hence this requirement raises the issue of to what extent the arbitrator is entitled to rely on his or her own specific knowledge and experience. For example the arbitrator may have great experience as to the cost of repairs and may not believe the expert evidence presented to him or her on this particular issue. In a similar vein the arbitrator may wish to rely on evidence gathered through the arbitrator's own inspection or tests. Although the prevailing opinion seems to be that arbitrators should be able to rely on their own knowledge and expertise, they should disclose the specific matters to the parties, in good time before an award is made so as to enable the parties to challenge the specific matters relied on.⁷²⁹

⁷²⁶ *Brandstetter v Austria* (1993) 15 EHRR 378 (ECtHR) 413 (in the context of criminal proceedings); *Bricmont v Belgium* (1990) 12 EHRR 217 (ECtHR) 240-241

⁷²⁷ *Eg Norbrook Laboratories v A Tank and Moulson* 2006 WL 1333300 (Comm)- arbitrator was removed because of bias after contacting witnesses direct; see also Canon III B American Arbitration Association *Code of Ethics for Arbitrators in Commercial Disputes* fn 645; J Tackaberry, A Marriott fn 674 160

⁷²⁸ G Petrochilos fn 501 146

⁷²⁹ *Fox v Wellfair* [1981] 2 Lloyd's Report 214 (CA) 522 and 528-530; *Checkpoint Ltd v Strathclyde Pension Fund* (2003) 14 EG 124 (CA) para 41; *Zermalt v Nu-Life Upholstery* (1985) 275 EG 1134, 1138; J Tackaberry, A Marriott fn 674 162-167

4.2.4 Conclusion

The principle of fair hearing in adjudication at its core requires that each party is allowed to present his or her case as to evidence and law and to react to the case of the other on an equal footing. However, there is no 'checklist' of fair hearing requirements each procedure has to comply with, but rather the detailed requirements depend on the nature of the dispute and the issues at stake. While the civil (or even more so, the criminal) procedure rules describe the procedural protections before the courts, in arbitration, the procedure is chosen by the parties (by reference to institutional rules or by agreement). Hence it is difficult to define a minimum of procedural protections to which each party is entitled to, save for the principle that the arbitrator (and the arbitration institution) must treat the parties equally and rationally. This means that parties may be less well protected in exchange for a (possibly) speedier and more cost effective procedure. This is not an issue if the parties are aware of the consequences of renouncing procedural protections and if they have made a well-informed and voluntary waiver of their rights. If arbitration is mandatory or if the parties are subject to a power imbalance this may be more problematic.

5. Duty to Give Reasons

The duty to give reasons is an important procedural protection in addition to the fair hearing considerations outlined in the preceding section.

Due process requires that the decision-maker does not discriminate against either party (equal treatment) and does not take into account irrelevant considerations (rationality). It is argued here that the giving of reasons aids both these aims.⁷³⁰

⁷³⁰ L Fuller fn 38 388

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By giving reasons the decision-maker explains the basis for the decision and justifies it according to authoritative standards.⁷³¹ This leads to better and rational decisions, as the decision-maker will have to explain and defend the decision both in relation to the facts found and the decision he or she comes to⁷³², which will result in the parties being treated according to authoritative standards and hence, equally and rationally.

The rationalisation of a decision helps to prevent arbitrariness and discrimination in decision-making. Frequently the instinctive decision of what is right and what is wrong, does not accord with the decision reached by proper reasoning according to legal standards. In addition, the reasons form a basis for the review of a decision enabling others to critically understand and appraise the decision, which is of crucial importance if a party wishes to appeal a decision.⁷³³ Galligan notes as a third argument for the significance of the giving of reasons that this is a way of providing satisfaction to the parties, as it makes them feel that they have been treated according to authoritative standards and not arbitrarily.⁷³⁴

Clearly the detail and nature of reasons depends on the issues to be decided. If they consist merely of statements of facts, they can be brief. As *Redfern & Hunter* point out where an arbitrator or other adjudicator merely has to decide whether goods correspond to a sample or not the answer can be a 'yes' or 'no'.⁷³⁵

⁷³¹ DJ Galligan fn 52 430

⁷³² AS Rau fn 126 530-531; see also *Henry LJ* in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA) p 381: 'a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.'

⁷³³ DJ Galligan fn 52 432

⁷³⁴ DJ Galligan fn 52 433. M Rutherford 'Documents-Only Arbitrations in Consumer Disputes' in fn 641

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⁷³⁵ Albeit that the 'no' probably requires a brief explanation of in what way the goods differ from the sample, A Redfern, M Hunter fn 270 453

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It seems that under the common law there was traditionally no absolute or general duty to give reasons.⁷³⁶ However the trend of the law seems to recognise a duty to give reasons for both administrative and judicial bodies where this is required as a matter of fairness and openness.⁷³⁷ In particular, fairness requires the giving of reasons where the decision has important implications for the individual's rights and obligations and the decision-maker is acting in a judicial function.⁷³⁸

Furthermore, under the ECHR⁷³⁹, which now is incorporated into UK law under the Human Rights Act 1998, the giving of reasons is required as implicit in the fair hearing principle.⁷⁴⁰

In the English case of *Flannery v Halifax Estate Agencies Ltd*⁷⁴¹ the Court of Appeal stated clearly that the modern judge has a professional obligation to give reasons for a decision.⁷⁴² In *Flannery* the Court of Appeal ordered a retrial, as the first instance judge had preferred the defendants' expert evidence without giving an explanation as to why. In the later Court of Appeal case of *English v Emery Reimbold*⁷⁴³ Lord Phillips MR approved of *Flannery* and referred to the cases of the European Court of Human Rights but also discussed the problem of applying the principle in practice due to its elusive nature. In practice, it is difficult to ascertain how detailed the reasons should be. He stated as a minimum principle that it should be possible to deduce from a judgment the reasons for the decision.⁷⁴⁴ He said that

⁷³⁶ DJ Galligan fn 52 435; G Flick fn 479 127; *Doody v Secretary of State for the Home Department* [1994] 1 AC 531, 564; *R (Irvine) v The Royal Burgess Golfing Society of Edinburgh* [2004] LLR 334 (Court of Session) para 46;

⁷³⁷ *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA) 381; *Peter Andrew English v Emery Reimbold & Strick Limited* [2002] 1 WLR 2409 (CA) para 15-16; *Doody* [1994] 1 AC 531, 564-656; *Stefan v General Medical Council* [2000] 1 WLR 1293, 1300; *Brabazon-Drenning* [2001] HRLR 6 para 24-29; see also DJ Galligan fn 52 435

⁷³⁸ *ibid*

⁷³⁹ *Van de Hurk v Netherlands* [1994] 18 EHRR 481 para 61; *Hiro Balani v Spain* [1995] 90 EHRR 566 para 27; *Helle v Finland* [1998] 26 EHRR 159 para 59-60; *Garcia Ruiz v Spain* [2001] 31 EHRR 589 para 23; *Hirvisaari v Finland* [2004] 38 EHRR 7 para 30

⁷⁴⁰ *North Range Shipping Ltd v Seatrans Shipping Corporation* [2002] 1 WLR 2397 (CA); *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA); *Peter Andrew English v Emery Reimbold & Strick Limited* [2002] 1 WLR 2409 (CA)

⁷⁴¹ [2000] 1 WLR 377 (CA)

⁷⁴² *ibid* 381

⁷⁴³ *Peter Andrew English v Emery Reimbold & Strick Limited* [2002] 1 WLR 2409 (CA)

⁷⁴⁴ *ibid* para 2

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‘justice will not be done if it is not apparent to the parties why one has won and the other has lost’.⁷⁴⁵

In *Hirvisaari v Finland*⁷⁴⁶ the claimant appealed a ruling by a Finnish pension board who had decided in a brief ruling that the claimant was able to work part-time and hence reduced his pension and this ruling was simply confirmed on appeal by the Finnish Insurance Court. The European Court of Human Rights reiterated that Article 6 (1) of the ECHR required that all courts and tribunals should adequately state the reasons on which their judgments are based. The extent of this duty may vary according to the nature of the decision and all the circumstances of the case.⁷⁴⁷ However courts or tribunals are not obliged to give a detailed answer to every argument raised before them. The reasons must be in sufficient detail to allow the parties to make effective use of any available right of appeal, but can otherwise be brief.⁷⁴⁸ It is in principle, admissible for an appeal court simply to affirm the reasoning in the court below.⁷⁴⁹ However in this case there was an inconsistency in the reasoning of the first instance body, the pension board, as the claimant had previously received a full pension and it was ultimately unclear why the pension board reassessed the degree of his disability. Hence it was not sufficient for the appeal court to merely reaffirm that ruling without any further explanation.⁷⁵⁰

By contrast in *Van de Hurk v Netherlands* the European Court of Human Rights held that the court must merely demonstrate that it has addressed the contentions advanced by the parties⁷⁵¹ and in *Helle v Finland* it found that the court is under a duty to address the essential issues which were submitted to it.⁷⁵² Lord Phillips MR in *English v Emery Reimbold* interprets the standard established by the European

⁷⁴⁵ *ibid* para 16

⁷⁴⁶ *Hirvisaari v Finland* [2004] 38 EHRR 7; see also *Ruiz Torija v Spain* [1994] 19 EHRR 553, para 29 and *Garcia Ruiz v Spain* [2001] 31 EHRR 22 para 26

⁷⁴⁷ *ibid* para 30

⁷⁴⁸ *ibid*

⁷⁴⁹ *ibid*

⁷⁵⁰ *ibid* para 31

⁷⁵¹ [1994] 18 EHRR 481 para 59

⁷⁵² [1997] 26 EHRR 159 para 60

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Court of Human Rights as meaning that the reasons must demonstrate that the essential issues raised by the parties have been taken into consideration by the court and how these issues have been resolved.

The implementation of the ECHR in the Human Rights Act 1998 has had the effect in England that for certain types of decisions where under the common law no reasons needed be given, now the court is under a duty to give at least minimum reasons. One example for this is a court's refusal to give leave to appeal against an arbitration award under section 69 of the Arbitration Act 1996. The Court of Appeal has recently held that in order to comply with Article 6 of the ECHR, the Court has to give at least minimal reasons.⁷⁵³

Opinions vary as to whether the giving of reasons should be mandatory in the substantial arbitration award.⁷⁵⁴ One view is that reasons should be given as a due process requirement: a person making a binding decision defining the rights and obligations of others should state the reasons for his or her ruling.⁷⁵⁵ Another view is that the giving of reasons makes the award vulnerable to being appealed, which conflicts with the principle of finality of arbitration awards.

Some laws⁷⁵⁶ and arbitration rules⁷⁵⁷ require that awards should always be accompanied by reasons. Other laws, including the English Arbitration Act 1996 and the UNCITRAL Model Law⁷⁵⁸ and many arbitration rules⁷⁵⁹ mandate reasons, unless the parties have agreed to have an award without reasons or the award is an agreed award. The English Arbitration Act 1996 provides that if the parties have

⁷⁵³ *North Range Shipping Ltd v Seatrans Shipping Corporation* [2002] 1 WLR 2397 (CA) para 27

⁷⁵⁴ JDM Lew et al fn 270 647

⁷⁵⁵ J Tackaberry, A Marriott fn 674 11-391, 345

⁷⁵⁶ Belgian Judicial Code Art.1701 (5), Art.1704 (1) (i) states that an award may be set aside if the reasons are not stated; French Nouveau Code de Procedure Civile Art.1471

⁷⁵⁷ ICC Rules Art.25 (2); ICAC Rules Para 41 (1); ICSID Rule 47 (1) (i)

⁷⁵⁸ UNCITRAL Model Law Art.31 (2), English Arbitration Act 1996 s.52 (4), Arbitration Law of the People's Republic of China 1994 Art.54, German Arbitration Act 1998 in the Civil Procedure Code s.1054 (2)

⁷⁵⁹ UNCITRAL Rules Art.32 (3); CIETAC Rules Art.55; AAA ICDR Art.27 (2); LCIA Rules Art.26 (1); WIPO Art.62 (c) which also dispense with the reasons if the applicable law states that no reasons need be given.

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agreed to an award without reasons, they are deemed to have excluded the right to appeal to the court on a point of law.⁷⁶⁰ The parties sometimes agree to have a ‘bare’ award accompanied by a statement of reasons for the award, which is confidential, *ie* cannot be used in an appeal before a court. This practice has been customary in some kinds of arbitration, such as London maritime arbitrations.⁷⁶¹

However, in exceptional circumstances, even where the parties have agreed to maintain the reasons confidential, they may be disclosed to the court if public interest considerations override the parties’ intentions. In such cases the ‘confidential award’ may be used before the court to correct a logical or clerical error (such as a miscalculation), or to set aside the award for serious irregularity⁷⁶² or bar enforcement for other public policy reasons. However it may not be used to appeal the award on a point of law.⁷⁶³

Finally, some arbitration laws are silent on the point, implying that there is no duty to give reasons.⁷⁶⁴ The US domestic practice is that no reasons need be given and the US Supreme Court has expressly held that arbitrators have no obligation to provide reasons for their award.⁷⁶⁵

Hence it seems that many arbitration laws and rules requires the giving of reasons, at least unless the parties have agreed otherwise. This is important to ensure the rationality and quality of the award. As has been argued above the giving of reasons is important for fairness and this is reflected by those arbitration laws and rules which require the giving of reasons.

⁷⁶⁰ S.69 (1)

⁷⁶¹ *The Montan* [1985] Lloyd’s Report 189 (CA); LMAA Rule 22 (b), (c), (d)

⁷⁶² S.68 Arbitration Act 1996

⁷⁶³ J Tackaberry, A Marriott fn 674 11-391, 348; *The Montan* [1985] Lloyd’s Report 189 (CA) 192-193; *The Easy Rider* [2004] 2 Lloyd’s Report 626 (Comm) 25-28

⁷⁶⁴ For example the US Federal Arbitration Act

⁷⁶⁵ *United Steelworkers of America v Enterprise Wheel & Car Corp* 363 US 593, 598 (1960); for the federal jurisdiction see also *Michael M Pfeifle v Chemoil Corporation* 73 Fed Appx 720, 722 (2003)

6. Transparency versus Confidentiality

In this section it is argued that the traditional notion that arbitration proceedings are confidential to the parties is problematic from the due process perspective. This traditional notion of arbitration means that the award, any documents and even the fact that arbitration has taken place is classified as confidential.

There is anecdotal evidence that parties frequently choose (private) arbitration over (public) litigation for the very reason of confidentiality.⁷⁶⁶ In other words, arbitration would lose some of its attractiveness as a dispute resolution process, if the principle of confidentiality was undermined. For this reason, arbitration practitioners frequently argue that, as a matter of sound commercial practice, the principle of confidentiality should not be compromised. However, what is good for the business of arbitration practitioners should not necessarily be determining policy.

The extent of confidentiality and the permissibility of disclosure in certain circumstances are highly controversial topics, but there is a developing body of law on the question of when awards can be disclosed. For the Model proposed in this thesis more transparency in arbitration is desirable. While first movements in this direction have been made by the courts in several jurisdictions, this is an issue which needs much further refinement, particularly in evaluating the *public* interests at stake. This is all the more relevant where the parties are subject to a power imbalance. Interestingly, by way of example, one tentative step in this direction has been made by the Californian Code of Civil Procedure. It requires the publication of statistics about consumer awards, including the name of the business party, type of dispute, the amount of the claim and the amount of the award made.⁷⁶⁷

⁷⁶⁶ JDM Lew et al fn 270 660; A Redfern, M Hunter fn 270 32

⁷⁶⁷ Californian Code of Civil Procedure, s.1281.96

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To this end, it should first be explained why transparency is desirable. Then the law on confidentiality is reviewed to show that at present the balance between confidentiality and transparency is inadequate.

6.1 The case for transparency

The case for transparency in adjudication generally can easily be made out, to quote *Bentham*, ‘publicity is the very soul of justice’.⁷⁶⁸ Needless to say, in relation to the courts, the principle of transparency has been well-established. It is usually based on the case of *Scott v Scott*, where *Viscount Haldane* said that ‘courts must, as between parties, administer justice in public’.⁷⁶⁹ The principle is also reflected in CPR 39.2 (1) and the ECHR Article 6⁷⁷⁰. The Law Commission of New Zealand has also made a clarion call for transparency in arbitration, for example. It has expressly acknowledged that ‘public policy concerns about transparency (achieved through disclosure of information) with regard to business enterprises operated in both the public and private sector must be recognised’.⁷⁷¹

It is possible to distinguish three due process⁷⁷² arguments why it can be in the public interest to disclose arbitration awards. The first argument is informational equality of the parties. The second argument presented here is that of scrutiny and quality assurance, which improves rationality, and hence due process. The third argument is that the law can only develop rationally and consistently if decisions published.

⁷⁶⁸ Works of Jeremy Bentham, quoted by *Lord Shaw* in *Scott v Scott* [1913] AC 417 (HL) 477

⁷⁶⁹ [1913] AC 417 (HL) 423, 442

⁷⁷⁰ *Eg Werner v Austria* (1998) 26 EHRR 310 349

⁷⁷¹ Law Commission of New Zealand *Report 83 Improving the Arbitration Act 1996* February 2003 available from <http://www.lawcom.govt.nz/> [14. September 2007]

⁷⁷² Due process consists of equality and rationality see 2-2

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6.1.1 Informational equality

The first and foremost reason why transparency is of utmost importance in adjudication generally is informational equality between the parties. Transparency directly counterbalances the inequalities of knowledge between the ‘repeat player’ and the ‘single shot player’⁷⁷³ in adjudication.⁷⁷⁴

Clearly businesses and institutions using a procedure regularly have an advantage over a person using it only once to solve a dispute. Repeat players will have gained superior information about the rulings which have been made on points of law and evidence, about individual adjudicators’ propensities and about the procedural tactics to be employed.⁷⁷⁵ This differential in information would be compensated if the decisions (awards) and the names of adjudicators were published.

Two US Circuit Courts, in, *Cole v Burns International*⁷⁷⁶ and more recently, in *Ting v AT&T*⁷⁷⁷, have explicitly acknowledged that confidentiality provisions for arbitration in adhesion contracts⁷⁷⁸ favour companies over individuals, if companies continually arbitrate the same claims.⁷⁷⁹ However in *Cole*, in the context of employment arbitration, the Court denied that there was any harm to the employees from this repeat player effect in favour of the employer for the reason that the employees were legally represented and awards were looked at by the appointing institution.⁷⁸⁰ By contrast, in *Ting* concerning a state court, consumer class action against the telecommunications carrier, the Court held that a gagging order would reinforce the disadvantage suffered by the consumer plaintiffs, as they were claiming against a very large and powerful institution:

⁷⁷³ Terminology- M Galanter fn 123 97; AS Rau fn 126 525-526; L Bingham fn 62 228; discussed further in 3-5.2

⁷⁷⁴ J Sternlight fn 655 686; R Reuben fn 128 1085

⁷⁷⁵ LJ Gibbons fn 641 772, 784, 789; M Galanter fn 123 98-99- for an explicit recognition before the US Court of Appeals for the 9th Circuit *Ting v AT&T* 319 F3d 1126, 1151-1152 (9th Cir Cal 2003)

⁷⁷⁶ 105 F3d 1465 (DC Circuit 1997)

⁷⁷⁷ 319 F3d 1126 (9th Circuit 2003)

⁷⁷⁸ *ie* contracts using non-negotiated standard form terms, such as employment and consumer contracts

⁷⁷⁹ *Cole* 105 F3d 1465 (DC Circuit 1997) 1476; *Ting* 319 F3d 1126 (9th Circuit 2003) 1151

⁷⁸⁰ *Cole* 105 F3d 1465 (DC Circuit 1997) 1486

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‘AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent, while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract’.⁷⁸¹

It was stated that the confidentiality provisions would hinder potential future claimants from arguing their case against the telecoms giant. For this reason, the Court refused to reverse the District Court’s decision that the confidentiality clause was unconscionable.⁷⁸²

Hence, in summary, the first argument concerns mainly those cases where there is a power imbalance between the parties (*eg* consumer cases⁷⁸³) and hence the problem of repeat player advantage arises. In cases where one party uses arbitration repeatedly whereas the other party only uses arbitration once, there should be a mechanism for publishing award as otherwise the ‘one-shot’ player will suffer considerable disadvantage.

6.1.2 Scrutiny as quality assurance

The second reason for transparency in decision-making generally is that it is important as a form of quality assurance of the decision to ensure decisions are rational.⁷⁸⁴ This is important for due process. It serves to ensure that the decision-maker makes rational findings of fact, properly applies legal standards and does not venture beyond his or her power of authority, since the adjudicator’s decision is put to public scrutiny.⁷⁸⁵

⁷⁸¹ *Ting* 319 F3d 1126 (9th Circuit 2003) 1152

⁷⁸² *ibid*

⁷⁸³ MS Abdel Wahab ‘Does Technology Emascuate Trust? Confidentiality and Security Concerns in Online Arbitration’ [September 2004] Special Supplement: Using Technology to Resolve Business Disputes *ICC International Court of Arbitration Bulletin* 43-51, 48

⁷⁸⁴ *W Park* fn 40 42

⁷⁸⁵ See 6-5

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Transparency is an essential safeguard against bias and incompetence - to quote *Bentham* again '[publicity] is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.'⁷⁸⁶ In addition, transparency has an *indirect* effect in combating power imbalances by exposing potential structural or systemic bias and allowing criticism of possible deficiencies in a process.

This symptom of the repeat player syndrome can only be exposed if awards are published⁷⁸⁷. The publication of rulings under the UDRP has led to some criticism of the UDRP on the basis that the institutions offering dispute resolution under the UDRP have to appear friendly to the trade mark holders' interests, as the claimant trade mark holder chooses the institution. These criticisms have been bolstered by statistics relating to the outcomes of decisions, which would not have been possible without the publication of those decisions⁷⁸⁸. This will be further discussed in the next Chapter.

6.1.3 Development of the law

The third argument for transparency in adjudication is the importance of developing the law through the persuasive force or authority of precedent.⁷⁸⁹ This is an important aspect of due process and the rule of law. Under both the common law and the civil law (albeit to a greater extent under the former) important legal standards are established through the interpretation and re-interpretation of existing law.⁷⁹⁰

⁷⁸⁶ See fn 768

⁷⁸⁷ LJ Gibbons fn 641 783, 787; L Bingham fn 62 246, 258. The link between appointment and biased awards is clearly more tenuous in the case of institutions appointing arbitrators than in the case of claimants directly appointing the arbitrators.

⁷⁸⁸ See eg M Geist 'Fair.com?' (2002) 27 *Brooklyn Journal of International Law* 903-937, M Mueller 'Rough Justice: A Statistical Assessment of ICANN Uniform Dispute Resolution Policy' (2001) 17 (3) *The Information Society* 151-163.

⁷⁸⁹ MS Abdel Wahab fn 783 48; J Sternlight fn 655 686; W Park fn 40 11 fn 51

⁷⁹⁰ In relation to consumer cases, see R Bamford 'Shopping around: dealing with cross-border complaints' [2004] 14 *Consumer Policy Review* 108-112, 110

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The development of the law argument has been raised by *Colman J* to explain that arbitration is not completely confidential:

‘If one obliterated from the law reports all those cases where a substantial part of an arbitration award had been published for all to read one would be deprived of a massive part of the development of English commercial law.’⁷⁹¹

However, to the extent that arbitration is not the mainstream form of dispute resolution, it is hard to see how an individual unpublished award would matter. Clearly it would be nonsensical to argue that it deprives the law of a precedent. The function of some awards is merely to solve the dispute in question. Hence in relation to commercial arbitration the argument of law development may have limited application. This argument is limited to those cases where an appeal lies on a point of law and to sectors where arbitration (as opposed to litigation) is the dominant form of dispute resolution.

Hence, in sectors where points of law are dealt with by arbitration and where arbitration constitutes the main form of dispute resolution, publication of awards should be considered.

A related point is that not all contractual relationships are private in the sense that they only materially affect the parties to the contract. Standard form contracts and their interpretation might affect third parties on a large scale. Big players in a given market (whether a large business in their relationships towards consumers, or a large multinational corporation in their business dealings) might impose *de facto* legal standards by the terms and conditions they trade on, so that the interpretation of these standard terms is a matter of interest to the wider public. While the interpretation of the term in an arbitration award has no precedent value, it may have some persuasive force, if future cases would come before the same arbitrator or if there has been selective publication. Hence, the second category of cases

⁷⁹¹ *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd’s Report 243 (Comm) 247

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where awards should be systematically published are those where the ruling affects other, third parties⁷⁹², such as the interpretation of a standard contract term used in a series of transactions by a large corporation.

Having presented three arguments in favour of increased transparency in arbitration, the following section sets out the law on confidentiality in arbitration.

6.2 Presumption of confidentiality in arbitration

There has been a general assumption in the arbitration community that confidentiality should be an inherent, fundamental principle in arbitration as a *private* dispute resolution process.⁷⁹³ In the English case of *BLCT Ltd v J Sainsbury Plc* the Court of Appeal held that in arbitration the parties have waived their right to a public hearing by opting for arbitration as a method of dispute resolution.⁷⁹⁴

Unfortunately, this has also been the unquestioned position of the Strasbourg institutions in interpreting the ECHR.⁷⁹⁵ The EComHR has endorsed the notion that arbitration proceedings *a priori* are not public: ‘In some respects- in particular as regards publicity- it is clear that arbitral proceedings are often not even intended to be in conformity with Article 6.’⁷⁹⁶

6.3 What should be kept confidential?

Confidentiality in arbitration proceedings means that no documents, evidence nor the contents of the award should be disclosed to the outside world and that all hearings and meetings are conducted in private.⁷⁹⁷ In addition, confidentiality may

⁷⁹² A Tweedale ‘Confidentiality in Arbitration and the Public Interest Exception’ (2005) 21 (1) *Arbitration International* 59-70, 69

⁷⁹³ J Tackaberry, A Marriott fn 674 11-391, 306; G Petrochilos fn 501 150

⁷⁹⁴ [2004] 2 P&CR 3 (CA) Para. 36

⁷⁹⁵ *Nordström-Janzen and Nordström-Lehtinen v the Netherlands* EComHR Admissibility Decision of 27. November 1996 No 28101/95 available from the HUDOC database

⁷⁹⁶ *ibid*

⁷⁹⁷ J Tackaberry, A Marriott fn 674 11-391, 310

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encompass the mere fact that there are or have been arbitration proceedings between the parties.

6.4 Who is under a duty of confidentiality?

Another question is who is under a duty of confidentiality, since the obligation of the arbitrators, the administering institution (if any), the parties and any third parties who might have an interest in disclosure should all be assessed differently. First of all the arbitrators and any employees of the arbitral institution may well be bound by a duty of confidentiality either through professional rules⁷⁹⁸ or the rules of the arbitral institution⁷⁹⁹.

Tackaberry and *Marriott* point out that the obligation of confidentiality inherent in arbitration does not only apply to all parties, but to all persons involved in the arbitration, including witnesses.⁸⁰⁰ This would mean that if a witness was shown statements by other witnesses or any other documents prepared in the context of the arbitration he or she would be under a duty of confidentiality in respect of those documents.⁸⁰¹

What about the parties themselves or any third persons who claim to be affected by the award?

⁷⁹⁸ See *eg* Canon VI ICDR Code of Ethics for Arbitrators in Commercial Disputes of 1. March 2004; American Arbitration Association Standards of Ethics and Business Conduct available from <<http://www.adr.org/EthicsAndStandards>> [14. September 2007] or Part 2 Rule 2 (correspondence) and Rule 4 (relationship of confidentiality) of the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct of September 2004 available from the Chartered Institute of Arbitrators and on file with the author; see also the declaration arbitrators have to sign under the ICSID Rules, Rule 6 (2) available from <http://www.worldbank.org/icsid/basicdoc/partF-chap01.htm#r06> [14. September 2007]

⁷⁹⁹ See *eg* 2003 ICDR Rules of Procedure Art.34, LCIA Rules Art.30, ICC Rules Art.6, UNCITRAL Rules Art.32, DIS Arbitration Rules 1998 S.43 on Confidentiality, WIPO Arbitration Rules Art.76

⁸⁰⁰ Cf *Mason CJ* in *Eso Australia* who remarked *obiter* that witnesses were not subject to a general obligation of confidence, see fn 854 para 31

⁸⁰¹ J Tackaberry, A Marriott fn 674 11-391, 311

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6.5 Contract and institutional rules

Confidentiality obligations between the *parties* to the arbitration can arise from contract law, *ie* where the arbitration agreement or the institutional rules (the latter are a form of implied agreement between the parties) contain an express confidentiality clause. Confidentiality clauses in arbitration agreements are difficult to draft, as the parties might not want absolute confidentiality, so that the agreement has to provide for appropriate contingencies and exceptions.⁸⁰² First of all an arbitration award may need to be enforced by a court, which of course is a forum with public access.⁸⁰³ Furthermore, a party may be under an obligation to make disclosures regarding the arbitration, *eg* where it is a listed company, or where a party is selling its business and disclosure is required for the purposes of due diligence, or where one party has to make disclosures to an insurance or parent company. Another difficulty in drafting a confidentiality clause may be the question of its validity under the applicable law. Because of these difficulties with confidentiality clauses in arbitration agreements (and the associated costs with specialist legal advice), there has been a call for uniform, general rules for confidentiality. Such uniform rules (including exceptions) could be formulated by the institutional rules. However, institutional rules face the same formidable task of having to define the scope of the duty of confidentiality.

The 2003 ICDR Rules provide a presumption that hearings are private, unless the parties agree, or the law requires, to hold them in public.⁸⁰⁴ The Rules furthermore establish that any matters relating to the arbitration or the award should not be disclosed by the arbitrator or the administrator unless otherwise agreed by the parties or required by law.⁸⁰⁵ The Rules also provide that an award may only be made public with the consent of all the parties or as required by law.⁸⁰⁶ However, interestingly the Rules also say that parts of an award may be made available, if

⁸⁰² A Tweedale fn 792 59

⁸⁰³ *City of Moscow v Bankers Trust* discussed below fn 843

⁸⁰⁴ Art.20 (4)

⁸⁰⁵ Art.34

⁸⁰⁶ Art.27 (4)

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edited to conceal the identity of the parties, unless all parties agree not to disclose any part of the award.⁸⁰⁷

The 1998 LCIA Rules provide that all the meetings and hearings should be conducted in private unless the parties agree otherwise.⁸⁰⁸ The parties are under a duty to keep the award, any documents used in the proceedings and any material prepared for the arbitration confidential, unless disclosure is necessary to comply with a legal duty, to pursue a legal right or to enforce or challenge an award before a court.⁸⁰⁹

Under the 1998 ICC Rules, the arbitral tribunal has the power to take measures to protect trade secrets and confidential information.⁸¹⁰ Furthermore Article 21 (3) provides that hearings cannot be attended by third parties unless the tribunal and the parties consent to this. The rules do *not* expressly oblige the parties to keep the award or any associated material confidential, but in practice the arbitrators recommend that a confidentiality clause is included in the terms of reference agreed by the parties.⁸¹¹

The 1976 UNCITRAL arbitration rules likewise stipulate that hearings are private⁸¹² and in addition that the award may only be made public with the consent of *both* parties⁸¹³. As to maintaining confidentiality of other documents such as pieces of evidence, written and oral arguments, the identity of the arbitrators and the fact that arbitration is taking place, UNCITRAL recommends that the party deal with these matters in an agreement on confidentiality.⁸¹⁴

⁸⁰⁷ Art.27 (8); reflecting international practice see JDM Lew et al fn 270 661

⁸⁰⁸ Art.19 (4)

⁸⁰⁹ Art.30 (1)

⁸¹⁰ Art.20 (7)

⁸¹¹ With all the associated difficulties of drafting such a clause; H Bagner 'Confidentiality-A Fundamental Principle in International Commercial Arbitration?' (2001) 18 (2) *Journal of International Arbitration* 243-249, 244

⁸¹² *In camera*, Art.25 (4)

⁸¹³ Art.32 (5)

⁸¹⁴ UNCITRAL Notes on Organizing Arbitral Proceedings of 1996, paras 31, 32

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The WIPO Arbitration Rules contain the strictest provision on confidentiality. This includes a duty of the parties and any third party to keep the existence of arbitration a secret.⁸¹⁵ The duty of confidentiality expressly refers to documents and evidence and expressly includes witnesses, *ie* it is the obligation of each party to ensure that the witnesses called on their behalf maintain confidentiality.⁸¹⁶ Furthermore there is an express requirement that the award is kept confidential subject to an exception where disclosure is necessary to comply with the law or for a party to protect their rights *vis-à-vis* another party.⁸¹⁷ Article 76 of the WIPO Arbitration Rules expands these duties of confidentiality to the arbitrator and the Center.

From this brief qualitative review it seems that some of the most important sets of arbitral rules provide that the hearing must be private. With the exception of the ICC Rules it seems that the arbitration rules establish a presumption that the award is maintained confidential by the parties, *ie* it can only be published with the consent of all parties (subject to exceptions). However, only the LCIA Rules and the WIPO Rules impose an express duty on the parties to keep other arbitral documents secret. With the exception of the WIPO Rules, the rules seem to put the parties under no obligation not to disclose the fact that arbitration proceedings are or have been taking place.

6.6 Arbitration laws

Where there is no contractual arrangement as to confidentiality (whether in the arbitration agreement or in the institutional rules) the question arises whether there is a duty of non-disclosure under the *general* arbitration law.

There are large variations between different legal systems as to the non-contractual duties of confidentiality in arbitration. Arbitration laws, with the notable exception

⁸¹⁵ Art.73

⁸¹⁶ Art.74

⁸¹⁷ Art.75

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of New Zealand⁸¹⁸, do not expressly provide for arbitral confidentiality.⁸¹⁹ In the UK, in the case of the Arbitration Act 1996, this omission was a conscious decision-it was felt that the principle of confidentiality was best developed by the courts and that a general definition was inappropriate.⁸²⁰

The English courts have consistently held that there is an implied duty to maintain confidentiality in arbitration, being a principle intrinsic to arbitration, albeit that this duty may be subject to exceptions.

The first authority on this is the Court of Appeal case of *Dolling-Baker v Merrett*⁸²¹ concerning litigation under a contract for reinsurance. The defendants were the reinsurer and broker of the reinsurance policy. The plaintiff sought to obtain disclosure of arbitral documents (the award, pleadings, evidence, including transcripts) of an earlier arbitration involving the same defendants, under a very similar policy of reinsurance, but with a different claimant. *Parker LJ* found that there was an implied obligation on both defendants not to disclose or use for any other purpose any document prepared for and used in the arbitration. He based this obligation on the 'essentially private nature of arbitration coupled with the implied obligation of a party who obtains documents on discovery not to use them for any other purpose than the dispute in which they were obtained'.⁸²² Hence documents used in arbitration proceedings could not be disclosed in later litigation except with consent of both parties or pursuant to a court order. A court order allowing disclosure would only be made if disclosure or inspection of the documents was necessary for the fair disposal of the litigation. *LJ Parker* set out as the relevant criteria for making this assessment, being whether the information contained in the arbitral documents to be disclosed was relevant for the litigation before the court, whether there were no other practical means of obtaining this information elsewhere

⁸¹⁸ S.14: 'An arbitral agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings'.

⁸¹⁹ JDM Lew et al fn 270 660

⁸²⁰ J Tackaberry, A Marriott 'General Principles' fn 674 11-391, 315

⁸²¹ [1990] 1 WLR 1205 (CA)

⁸²² *ibid* 1214

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and most importantly, whether the information would be necessary for disposing fairly of the proceedings.⁸²³ The Court of Appeal in *Dolling-Baker* while finding an implied obligation of confidentiality, did not give a comprehensive definition of its extent or exceptions to it.

In another reinsurance case, *Hassneh*⁸²⁴, the reinsured was conducting arbitration against the reinsurer and litigation against the broker of the reinsurance. In order to aid settlement with the broker the reinsured wished to disclose to the broker not only an interim award obtained in his arbitration against the reinsurer, but also other arbitral documents such as pleadings, evidence and the transcript. *Colman J* confirmed that there was an implied duty of confidentiality in arbitration proceedings, which was implied in the arbitration agreement by business efficacy or custom.⁸²⁵ He pointed out that arbitration hearings have been held in private for hundreds of years and that the informality and candour of such private hearings were an essential ingredient to arbitration.⁸²⁶ He argued further that the private nature of the hearing must in principle extend to arbitral documents, as the disclosure of such documents would in fact open the doors of the arbitration room to the public.⁸²⁷ While thus underlining the importance of confidentiality in arbitration he also found that a distinction should be made between the reasoned award and other arbitral documents (such as pleadings, evidential documents and transcripts). Since the reasoned award identifies the parties' rights and duties and since it can be brought into public courts under their supervisory jurisdiction or for the purposes of enforcement, *Colman J* found that the duty of confidentiality is lower with regard to the award.⁸²⁸ He pointed out that the award or parts of it may sometimes be published in the context of the court's supervisory and enforcement jurisdiction and that this is important for the development of English commercial

⁸²³ *ibid* 1214-1215

⁸²⁴ *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Report 243 (Comm)

⁸²⁵ *ibid* 246

⁸²⁶ *ibid* 246-247

⁸²⁷ *ibid* 247

⁸²⁸ *ibid* 247

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law.⁸²⁹ Conversely, stricter standards of confidentiality apply in respect of other arbitral documents.

Hence *Colman J* found that the *award* may be disclosed without leave of the court if this was necessary for the establishment or protection of an arbitrating party's legal rights *vis-à-vis* a third party.⁸³⁰ By contrast, other arbitral documents could only be disclosed where all parties consented or with leave or by order of the court. The court should only allow disclosure of other arbitral documents where this is necessary for disposing fairly of the matter or for saving costs.⁸³¹

The Court of Appeal in *Ali Shipping Corp v Shipyard Trogir*⁸³² firmly repeated that there was an implied term of confidentiality in arbitration. It also held that this term was not only implied where business efficacy so demanded, but as a matter of law in each and every arbitration, without the need to examine the precise circumstances of the agreement in each case.⁸³³ As to the exceptions, however, the Court of Appeal was not quite as clear about the distinction between the disclosure of awards on the one hand and that of other arbitral documents on the other hand. *Potter LJ* stated four exceptions to the implied duty of confidentiality: consent, order of the court, leave of the court and disclosure necessary for the protection of legitimate interests of an arbitrating party. As to the latter exception he said: 'although to date this exception has been held applicable only to disclosure of an award, it is clear (...) that the principle covers also pleadings, written submissions and the proofs of witnesses as well as transcripts and notes of evidence given in the arbitration'.⁸³⁴ Hence it seems that the Court of Appeal found that the overarching principle for exceptions to the implied term of confidentiality was the necessity of disclosure for protecting an arbitrating party's interest.

⁸²⁹ *ibid*

⁸³⁰ *ibid* 248-249

⁸³¹ *ibid* 250-251

⁸³² [1998] 1 Lloyd's Report 643 (CA)

⁸³³ *ibid* 651

⁸³⁴ *ibid* 651

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Interestingly the Court Appeal said *albeit obiter* that courts must approach the question of disclosure with a flexible mind, so that in certain cases disclosure could be ordered where this was sought by a third party unconnected to the arbitration, if such disclosure was ‘in the interests of justice’.⁸³⁵ Here *Potter LJ* referred to the case of *London and Leeds Estates Ltd v Paribas Ltd (No2)*⁸³⁶ where *Mance J* had held that a litigating party was entitled to disclosure of a proof made by an expert witness in an earlier arbitration and which seemed to be inconsistent with the views expressed by that expert in the court proceedings.⁸³⁷

In yet another reinsurance case, *Association Electric*⁸³⁸ in a reference to the Privy Council from Bermuda, it was found that the award of an earlier arbitration *could be used* in a subsequent arbitration involving exactly the same parties despite an *express* confidentiality clause in the agreement. The respondents in that case sought to use the award, which had decided an important issue in relation to both arbitrations to support a plea of issue estoppel. *Lord Hobhouse* treated this use of the earlier award as a question of enforcing the rights conferred by the earlier award- the decision in the earlier award bound the parties and they hence were estopped them from thereafter disputing that decision.⁸³⁹

He criticised the approach of *Potter LJ* in *Ali Shipping*, expressing reservations about the desirability or merit of a blanket implied duty of confidentiality in arbitration. A general implied obligation of confidentiality ‘runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document (...) and elides privacy and confidentiality (...). Generalisations and the formulation of detailed implied terms are not appropriate.’⁸⁴⁰ Hence the Privy Council was reluctant to support a broad duty of confidentiality arising from implied terms. Although these statements were, strictly speaking, *obiter*, as the

⁸³⁵ *ibid* 651-652

⁸³⁶ [1995] 1 EGLR 102 (QB)

⁸³⁷ *ibid* 109

⁸³⁸ *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003]

1 WLR 1041 (PC)

⁸³⁹ *ibid* 1049-1050

⁸⁴⁰ *ibid* 1051

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case concerned an *express* confidentiality clause, it led some authors to conclude that the concept of confidentiality advanced in *Ali Shipping* is now open to doubts.⁸⁴¹ Furthermore, *Lord Hobhouse* reiterated the distinction first made by *Colman J* in *Hassneh* between disclosure of the award itself and other arbitral materials.⁸⁴²

The most recent case on this issue, *City of Moscow v Bankers Trust Company*⁸⁴³ concerned a challenge to an award on the grounds of serious irregularity under section 68 of the Arbitration Act 1996. This is the first case on the issue of whether a judgment resulting from the courts' supervisory jurisdiction over arbitration should be published. In particular, the Court of Appeal interpreted the new Civil Procedure Rules. Rule 62.10 (1) states that arbitration claims can be heard either in private or in public. Subject to the court ordering otherwise, Rule 62.10 (3) effectively states that a determination of a point of law⁸⁴⁴ under the courts supervisory jurisdiction should be heard in public, whereas all other arbitration matters should be heard in private. *Mance LJ* said that this distinction should only be the starting point for the analysis.⁸⁴⁵ The court should consider hearing the matter in open court or any party may apply for a public hearing, even where the Rules provide that, *prima facie*, the hearing should be private.⁸⁴⁶ Furthermore the fact that the hearing was held in private did not necessarily lead to the conclusion that the resulting judgment in the arbitration matter should not be published, as the judgment might incorporate less confidential information than that which would be disclosed during the hearing.⁸⁴⁷ He came to the conclusion that the courts should carefully balance considerations of confidentiality in arbitration proceedings with the requirement that all judgments of a public court should be public under Article 6

⁸⁴¹ S Kouris 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' (2005) 22 (2) *Journal of International Arbitration* 127-140 131; A Tweedale fn 792 60-61

⁸⁴² *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] 1 WLR 1041 (PC) 1051

⁸⁴³ [2005] QB 207 (CA)

⁸⁴⁴ Referring to sections 45 (preliminary point of law) and 69 (appeal on a point of law) Arbitration Act 1996

⁸⁴⁵ [2005] QB 207 (CA) 209

⁸⁴⁶ *ibid* 231

⁸⁴⁷ *ibid*

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ECHR and the common law. The court should in particular weigh up how much politically or commercially sensitive information would emanate to the public and whether this information can be protected by anonymising law reports.⁸⁴⁸

Mance LJ clearly stated that there should be a presumption in favour of publicity: ‘the desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent applies here as in other areas of court activity’.⁸⁴⁹ He rejected any suggestion that this would upset the confidence of the business community in English arbitration.⁸⁵⁰ However in the case subject to this appeal, he held that only a summary of judgment could be published, because of the politically and commercially sensitive information contained therein.

Hence while the English courts recognise an implied principle of confidentiality in arbitration this principle may be limited where the legitimate interests of the parties so demand and, possibly where it is in the interests of justice (where disclosure is demanded by a third party).

The English approach contrasts with that taken in US, Australia and Sweden where there is no implied duty of confidentiality. Confidentiality requires an express agreement of the parties. There are dicta in these jurisdictions which found that confidentiality does not attach to arbitration proceedings notwithstanding their private nature. Similarly there have been cases in international arbitration where the disclosure of the award was made in the public interest.

In the US, a federal court has refused to recognise a duty of confidentiality in international arbitration. In *United States v Panhandle Eastern Corp*⁸⁵¹ the US government moved to obtain disclosure of documents relating to an ICC arbitration

⁸⁴⁸ *ibid* 231-232

⁸⁴⁹ *ibid* 231

⁸⁵⁰ *ibid* 232

⁸⁵¹ 118 FRD 346 (DDel 1988)

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between Panhandle's subsidiary and an Algerian company to protect its security interests as guarantor of ship financing bonds. *Senior District Judge Latchum* in the District Court found that there was no general obligation of confidentiality in international arbitration and granted the US government's request for production of the documents. It seems that the US courts have not recognised a duty of confidentiality applying to arbitration as such⁸⁵² and have even been prepared to overrule an express confidentiality clause in the case of *Ting* discussed above.⁸⁵³

In the infamous case of *Esso Australia*⁸⁵⁴, the High Court of Australia on appeal from the Supreme Court of Victoria categorically denied that there was an implied duty of confidentiality in arbitration, in a majority decision of four to five judges⁸⁵⁵. All judges agreed that there was a public interest exception wider than the exception under the English authorities *viz* merely allowing an arbitrating party to disclose arbitral documents if necessary to protect *that party's* legitimate interests.⁸⁵⁶

Mason CJ pointed out that arbitration proceedings had never been completely confidential, *inter alia* since the supervisory and enforcement jurisdiction of the courts was of a public nature.⁸⁵⁷ He expressly rejected the English rulings finding an implied term of confidentiality (such as *Dolling-Baker* and *Hassneh*). *Mason CJ* held that there was no implied term of confidentiality and confidentiality could only

⁸⁵² *ibid*; *Industrotech Constructors Inc v Duke University* (1984) 314 SE 2d 272–274; *Giacobazzi Grandi Vini SpA v Renfield Corp* (1987) US Dist Lexis 1783; contrast this with the position in mediation, where confidentiality was held to prohibit disclosure of all statements, documents and discussions: *In re Anonymous* 283 F3d 627 (CA 4th, 2002)

⁸⁵³ See 6-6.1.1, fn 777

⁸⁵⁴ *Esso Australia Resources Ltd v The Right Honourable Sidney James Plowman* (1995) 128 ALR 391 (High Court of Australia)

⁸⁵⁵ *Mason CJ*, *Brennan J*, *McHugh J* and *Dawson J* agreeing and *Toohy J* dissenting

⁸⁵⁶ *Mason CJ* para 38, *Brennan J* para 8, *Toohy J* para 26. The Australian High Court referred to the English decisions of *Dolling-Baker* and *Hassneh*, however compare the English case of *London and Leeds Estates Ltd*, where the court allowed disclosure of arbitral documents (an expert proof) on the application of a third party, unconnected to the arbitration, since this was in the interests of justice. See also the dicta by *Potter LJ* in *Ali Shipping* discussed above.

⁸⁵⁷ Para 31: But compare the English approach as exemplified by the decision in *City of Moscow v Bankers Trust*, discussed above where the court decided that the full judgment of a challenge to an award could not be published, precisely because of confidentiality reasons.

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be based on an express term in the arbitration agreement (and such a term would not bind third parties in any case).⁸⁵⁸

6.7 Conclusion: an inadequate balance under English law

The English cases (*Dolling-Baker*, *Hassneh* and *Ali Shipping*) described above do not make clear whether the implied obligation of confidentiality in arbitration is based on the long-established equitable principles relating to confidentiality.

The common law (or, more accurately, equitable) principles relating to breach of confidence allow a claimant to obtain an injunction to prevent disclosure of confidential or private information and, where such information has already been disclosed, damages and other remedies, such as delivery up. The requirements for an action for breach of confidence are that the information must be of a confidential or private nature and it must have been imparted in a situation of confidence and there must have been an unauthorised disclosure (or threat of such disclosure) to the disadvantage of the person who communicated it.⁸⁵⁹ A situation of confidence can arise even absent express contractual provisions to this effect, where it should have been clear to the recipient of the information from all the circumstances that the information was to be kept confidential, taking into account the harmfulness of the disclosure (which must not necessarily lead to financial detriment), the relationship of the parties and the parties' expectation of privacy.⁸⁶⁰

However the equitable principles relating to confidence provide for a public interest exception and if the duty of confidence in arbitration is based on these principles, a public interest exception would *clearly* be available.⁸⁶¹ In *Ali Shipping Potter LJ*

⁸⁵⁸ *ibid* paras 35-37

⁸⁵⁹ *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] Ch 344 (ChD) 375; *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (ChD) 47; *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 (CA) 121

⁸⁶⁰ *Attorney General v Guardian Newspapers (No2)* [1990] 1 AC 109 (HL) 281 Lord Goff; *Campbell v MGN Ltd* [2004] 2 AC 457 (HL) Paras 13-14, 21 Lord Nicholls; 47-48 Lord Hoffmann; 85 Lord Hope; 134-135 Lady Hale

⁸⁶¹ A Tweedale fn 792 61

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gave a clear indication to the business community that there was no wide, general public interest defence lurking under English law.⁸⁶² He expressly referred to the *Esso Australia* case discussed above, where the public interest exception had been expressed in the widest terms. This indication notwithstanding, he left the door ajar, by saying that there might be further exceptions to the general rule of confidentiality: ‘while it may well fall to the English court at a future time to consider some further exception to the general rule of confidentiality based on wider considerations of public interest, it is not necessary to do so in this case’.⁸⁶³ At this time it seems that the English courts have had no opportunity to rule on the question of whether disclosure of an arbitration award could be in the public interest under certain circumstances. Hence it is open to some speculation under what circumstances such disclosure would be in the public interest. It is, however unlikely that such a public interest exception would go as widely as the point made at the beginning of this section, *ie* that publication is necessary for the interests of justice and transparency.

As has been discussed above, it seems that the English courts have assumed that there is a duty of confidentiality in arbitration. English courts have defined the exceptions narrowly, limiting them to the legitimate interests of the parties or the interests of justice, rather than the wider public interest. The courts have refused to acknowledge the wider implications of confidentiality and hence no adequate balance between confidentiality and transparency has been established under English law. This can also be contrasted with the position in other jurisdictions, where the courts have found in favour of transparency in arbitration by even rejecting an implied duty of confidentiality. A clearer definition of the public interest in line with the four arguments presented in section 0 is required here. This will be discussed in relation to the Model for internet disputes in Chapter Eight.

⁸⁶² [1998] 1 Lloyd’s Report 643 (CA) 652

⁸⁶³ *ibid*

7. Right of Appeal/Judicial Review of Arbitration Awards

The relevance of a right to appeal in the due process discussion is that, in addition to the duty to give reasons and transparency discussed above, an appeal helps to eliminate bad judgments and mistakes occurring at first instance and thereby contributes to a fair outcome (in terms of finding the true facts and applying the law to the facts correctly).⁸⁶⁴ It thus contributes to equal treatment and rationality.⁸⁶⁵

This function of appeals has two implications, one in the private interest and one in the general public interest. Firstly a right of appeal increases justice to the particular party appealing. But secondly and more importantly, there is also a public interest element. The availability of an appeal ensures that there is a body of decisions interpreting the law in a more authoritative manner, leading to greater consistency of the law overall. In courts, a hierarchical appeal system, providing for appeals on points of law, has the important function of ensuring an intelligent and authoritative interpretation of the law, thus contributing to the quality and predictability of the law. This function of an appeal system is probably more important than the function of providing justice in an individual case.⁸⁶⁶ For an individual it is equally tragic whether he or she loses on the facts or on the law. However the law usually restricts appeals to points of law, which shows that the public interest is more important than the private interest.

Thirdly, appeals are also necessary to guarantee the application of mandatory public norms, such as consumer protection. If there is no review of awards on the merits, if the parties cannot appeal on the basis that the arbitrator has not applied the law, this means that the strict law may well not be applied.⁸⁶⁷ For this reason *Ware* argues

⁸⁶⁴ J Sternlight fn 655 686

⁸⁶⁵ Elements of due process 2-2

⁸⁶⁶ In the context of arbitration see for example the grounds which must be fulfilled before an English court hears a judicial review of an arbitration award on a point of law. The ground in s.69 (3) (c) (i) applies if the question is not one of general public importance, in which case the decision of the tribunal has to be *obviously wrong*, whereas the ground in s.69 (3) (c) (ii) applies if the question is one of general public importance, in this case the decision only has to be *at least open to serious doubt*.

⁸⁶⁷ W Park fn 40 11, fn 51

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that arbitration does not only lead to privatisation of procedure, but also of substantive law.⁸⁶⁸ An appeal should therefore be considered as part of the procedure for fair adjudication.⁸⁶⁹

On the other hand, appeals increase costs and add further, significant delay. If the right to an appeal was not restricted in any way, the dissatisfied party losing a case would always seek to reverse the result. Hence the right to appeal has to be limited to the most deserving cases for any system of justice not to collapse. The question arises to what extent these considerations should apply to the review of arbitration awards by the courts.

First of all there is agreement that courts cannot review matters of fact, unless there are obvious and objectively ascertainable mistakes (such as a calculation error) to be corrected. Provided the parties have selected the arbitrator according to the agreed procedure and the award has been issued by an impartial arbitrator after having allowed each party a fair opportunity to argue their case, the parties should be bound by the arbitrator's evaluation of all *factual* matters. Another question is whether the parties should also be bound by the arbitrator's interpretation of the law.

Different considerations apply here for domestic and international arbitration. In international arbitration, a distinction has to be made between the courts of the seat of the arbitration, which the parties select to reflect their preference about which law should govern the arbitration procedure, and the enforcement courts. The enforcement courts are the courts called upon to recognise or enforce an award.

First review by the courts at the seat is considered. Under English Arbitration law, both for domestic arbitrations and in arbitrations where England is the *seat* there are

⁸⁶⁸ S Ware fn 316 719-720 and 725

⁸⁶⁹ S Ware fn 316 argues that without an appeal mandatory laws are not applied to arbitration, however he prefers the non-arbitrability of certain disputes to the creation of an appeal system, 751, 754- this would not be an option for internet disputes, hence an appeal system is necessary, M Philippe fn 413 188; T Schultz fn 440 100

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three distinct grounds for challenging an award before the courts: lack of substantive jurisdiction⁸⁷⁰, serious irregularity⁸⁷¹ and appeal on a point of law⁸⁷².

These grounds for review are subject to a requirement of exhausting the arbitral tribunal's own powers to correct any clerical errors or accidental slips or oversights⁸⁷³ and it is also subject to any arbitral appeal or review processes provided in the arbitration procedure itself. Furthermore there is a time limit of 28 days for bringing any appeals.⁸⁷⁴ Neither of these requirements is particularly problematic from a due process perspective.

Hence a party has a right to challenge an award for lack of substantive jurisdiction on the basis that it did not agree to arbitration or on the basis that it objects to the appointment or constitution of the arbitral tribunal. Furthermore, if the tribunal has infringed on its obligations to act impartially and to give each party a fair hearing the award can be challenged under the grounds of serious irregularity.⁸⁷⁵ This right of appeal also applies to the other eight forms of irregularity or misconduct listed in section 68 (such as the tribunal exceeding its powers⁸⁷⁶ or failure by the tribunal to conduct the arbitration according to the procedure agreed by the parties⁸⁷⁷), which are wide enough to encompass all forms of serious irregularity of procedure. However irregularity again, is interpreted narrowly and is only available in extreme cases where the tribunal has gone so wrong as to cause substantial injustice.⁸⁷⁸ A party may have lost the right to challenge the award on the grounds of lack of

⁸⁷⁰ S.67 Arbitration Act 1996

⁸⁷¹ S.68 Arbitration Act 1996

⁸⁷² S.69 Arbitration Act 1996

⁸⁷³ Sections 57 and 70 (2) Arbitration Act 1996

⁸⁷⁴ S.70 (3) Arbitration Act 1996

⁸⁷⁵ S.68 (2) (a)

⁸⁷⁶ S.68 (2) (b)

⁸⁷⁷ S.68 (2) (c)

⁸⁷⁸ *Egmatra AG v Marco Trading Corporation* [1999] 1 Lloyd's Rep 862 (Comm) 865; *Cameroon Airlines v Transnet Limited* [2004] EWHC 1829 (Comm) para. 102. eg where a party is not given a fair opportunity to address a key issue

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substantive jurisdiction or serious irregularity, if they knew (or could have known) about the grounds for challenge but failed to raise objections in a timely manner.⁸⁷⁹

If England is the seat or if the arbitration is a domestic English proceedings, a party can also appeal on a point of (English)⁸⁸⁰ law⁸⁸¹, but only if the parties have not agreed to exclude this ground of appeal⁸⁸² and there is a presumption that if the parties have agreed to dispense with reasons for the award that they have also excluded the right to an appeal on a point of law. An exclusion of the right to appeal on a point of law may be incorporated into the arbitration agreement by way of reference to arbitration rules and need not be set out explicitly in the arbitration clause⁸⁸³, such as the rules of institutions such as the ICC, which incorporate an automatic exclusion of appeal.⁸⁸⁴

In any case, under section 69 an appeal under this ground can only be brought with leave of the court⁸⁸⁵. The Court must give reasons for the decision on whether to allow an appeal⁸⁸⁶, but will usually consider an application for leave to appeal without an oral hearing.⁸⁸⁷ An oral hearing would only be required in exceptional circumstances where this is necessary to ensure the fairness of the hearing, such as that the judge lacked the necessary material to make a decision.⁸⁸⁸

Section 69 (3) essentially severely limits appeals on a point of law to the most deserving cases, taking into account the perspective of the parties' rights and the

⁸⁷⁹ S.73: *ASM Shipping Ltd of India v TTMI Ltd of England* [2006]EWCA Civ 1341 paras. 9, 11 and 13 Judgment of 16. October 2006

⁸⁸⁰ Other laws are facts

⁸⁸¹ Limited rights of appeal are also possible under some other laws, eg Australia's Commercial Arbitration Act 1984, s. 38

⁸⁸² Cf s. 87 (1) (b) Arbitration Act 1996

⁸⁸³ *Sukuman Ltd v Commonwealth Secretariat* [2006] EWHC 304 (Comm) para. 21

⁸⁸⁴ Art.28 ICC Arbitration Rules

⁸⁸⁵ S.69 (2)

⁸⁸⁶ *North Range Shipping Ltd v Seatrans Shipping Corporation* [2002] 1 WLR 2397 (CA) para 27

⁸⁸⁷ S.69 (5); *BLCT Ltd v J Sainsbury Plc* [2004] 2 P. & C.R 3 (CA) para. 36

⁸⁸⁸ Para. 38

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importance of the point of law for the public interest.⁸⁸⁹ If the legal point which is appealed is not of general public importance then the test is that the arbitrators must have been obviously wrong on a question of law. This test imposes a high standard:

‘it is not enough to say maybe they were wrong or even that there is only a possibility that they were right. The Court has to be satisfied that the arbitrators were obviously wrong on a question of law’.⁸⁹⁰

In *BLCT Ltd v J Sainsbury Plc* the Court of Appeal said expressly that the limitations on the right of appeal in section 69 of the Arbitration Act 1996 are in accordance with Article 6 of the ECHR.⁸⁹¹

While English law still allows for some vestiges of review on the merits, there is a clear tendency to interpret the parameters for review narrowly, as the cases discussed above demonstrate.

In other common law jurisdictions there are also relics of a right to have a review on the merits. Under US Federal law an award can be challenged in certain instances of fraud or corruption, arbitrator misconduct or where the arbitrators exceeded their power.⁸⁹² As to the merits there is a ground for review created by the case law, *ie* an award can only be set aside on the merits if it is in manifest

⁸⁸⁹ S.69 (3) provides that (a) the determination must affect the *rights* of at least one party, (b) that it was a question which the tribunal was asked to determine, (c) the decision of the tribunal is either obviously wrong or it concerns a question of general public importance and the decision is at least open to serious doubt and (d) that it is just and proper for the court to determine the question; the English Courts have also made clear that an error of law cannot be disguised as a serious irregularity, such as the tribunal exceeding its powers. This is important as the courts power to review cases on points of law can be excluded, whereas the latter cannot. So a mistake as to the currency was not a serious irregularity, see the *Lesotho Highlands v Impreglio SpA* case, [2005] UKHL 43 (HL)

⁸⁹⁰ Mr Justice Tuckey in *Egmatra AG v Marco Trading Corporation* [1999] 1 Lloyd's Rep 862 (Comm)

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⁸⁹¹ [2004] 2 P. & C.R 3 (CA) para. 33, *Sukuman Ltd v Commonwealth Secretariat* [2006] EWHC 304 (Comm), para 26

⁸⁹² Federal Arbitration Act 9 USC §10

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disregard of the law.⁸⁹³ This is a much stricter standard than merely applying the law erroneously, it must amount to the arbitrators wilfully disregarding the law.⁸⁹⁴

In other common law jurisdictions, appeals on the merits are even more restricted. Under the New Zealand Arbitration Act 1996 appeals on points of law are only allowed in international arbitrations, if both parties agree.⁸⁹⁵

By contrast in many civil law countries courts have no control of the merits of the award, where the appeal is on a question of law (as opposed to due process).⁸⁹⁶

Likewise the UNCITRAL Model Law provides for recourse to a court for setting aside the award on due process grounds, but does not provide for any appeal on a point of law.⁸⁹⁷ However some civil law⁸⁹⁸ jurisdictions and the UNCITRAL Model Law⁸⁹⁹ contain a public policy gloss on this- they include public policy as a ground for judicial review. The public policy ground (even if interpreted as the more limited notion of public international policy) may well contain substantive aspects. As *Park* points out:

‘Public policy (...) implicates a cluster of chameleon-like notions whose unifying essence lies in overriding societal interests that constrain how arbitrators decide cases’.⁹⁰⁰

This public policy gloss notwithstanding, *Park* claims that this laissez-faire model of judicial review represents the predominant trend for international commercial arbitration, for review at the seat of arbitration.⁹⁰¹ He states that international arbitration has been driven in recent years by a tendency to give arbitration tribunals

⁸⁹³ For example *Bowen v Amoco Pipeline Co* (2001) 254 F3d 925 (Tenth Circuit) 932

⁸⁹⁴ *ibid*

⁸⁹⁵ S.6

⁸⁹⁶ JDM Lew et al fn 270 677-678; W Park fn 40 11

⁸⁹⁷ Art.34. essentially the same list as that in Art.V 1958 NYC

⁸⁹⁸ See for example French NCPC Art.1502 (c)

⁸⁹⁹ Art.34 (2) (b) (ii)

⁹⁰⁰ W Park fn 40 15

⁹⁰¹ W Park fn 40 12

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greater autonomy from supervision by national courts at the seat of the arbitration.⁹⁰² Some commentators even argue for the complete abolition of review by the courts at the seat of arbitration, foreclosing any review there on procedural or substantive grounds.⁹⁰³

The reason for this growing tendency to restrict control of awards at the seat is that for international arbitration a multitude of different national courts may, in certain scenarios be competent to review an award and this causes obvious conflicts and inefficiencies, for example the court at the seat may set aside the award and a party may nevertheless attempt to enforce the award in a different country.⁹⁰⁴

Up until this point, the discussion has been limited to the position at the seat of the arbitration or domestic arbitration. Looking at the position of the enforcing courts, this is governed by the 1958 New York Convention⁹⁰⁵ for signatory states. Their courts can only refuse to recognise and enforce an award in the limited circumstances set out in Article V of that Convention and these are reflected in section 103 of the Arbitration Act 1996 (for New York Convention awards). While these grounds have been briefly discussed above⁹⁰⁶, it suffices to say here that these grounds do not directly include a review on substantive points of law. They do include⁹⁰⁷ public policy as a ground, the malleability of which has been pointed out above in this section.⁹⁰⁸ However, as has been discussed above⁹⁰⁹, courts in general have been slow to refuse enforce foreign awards on public policy grounds in order

⁹⁰² Ibid

⁹⁰³ P Fouchard 'La Portée Internationale de l'Annulation de la Sentence Arbitrale dans son Pays d'Origine' (1997) 3 *Revue de l'Arbitrage* 327-352, 349: 'On le voit, la primauté reconnue au juge du siège de l'arbitrage aux fins de coordination du contrôle de la sentence présente bien des dangers. Il n'est donc pas illégitime de limiter ses inconvénients.' and 352 he concludes: 'Le seul contrôle judiciaire dont elles seraient l'objet aurait lieu lors d'une demande de reconnaissance ou d'exécution dans un pays déterminé. (...) sa justification ultime est d'ordre logique: pourquoi annuler une sentence si elle n'a pas à être exécutée dans ce pays?'.

⁹⁰⁴ A detailed discussion of this conflict is outside the scope of this discussion, but see P Fouchard fn 903

⁹⁰⁵ 330 UNTS 3 (NYC), adopted New York 10. June 1958, entered into force on 7. June 1959

⁹⁰⁶ 6-2.6

⁹⁰⁷ S.103 (3)

⁹⁰⁸ The delineation between procedural and substantive issues and the concept of public policy are outside the scope of this dissertation.

⁹⁰⁹ 6-2.6

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to encourage arbitration as a dispute resolution mechanism in international trade. For example in the case of *OTV SA v Hilmarton Ltd*⁹¹⁰ the English courts enforced an award, even though the contract underlying the claim was illegal in the place where the contract was to be performed. The case concerned the payment of a fee to an intermediary and the Court pointed out that there had been no bribery and the contract had not been illegal under Swiss law which was the law applying to the contract.

Therefore, for English courts, there are wider grounds for the courts to annul an award, when acting under the supervisory jurisdiction of the seat than there are if the English courts are enforcing a foreign New York Convention award.

If the system was changed to disallow any setting aside of awards at the seat, this would mean that for most international arbitrations the grounds would be limited to those contained in the New York Convention, disallowing all reviews on the merits on points of law.

In conclusion, there is an observable trend to restrict the review of arbitration awards on the substantive merits. This is particularly true for international arbitration to avoid conflicts between courts and forum shopping. This restriction of the review of the merits is an expression of a preference for efficiency and speed even at the cost of allowing the occasional false interpretation of law. This means that the public, general interest of appeals, *ie* the development of the law through precedent is definitively and increasingly taking a backseat.

As the above brief discussion has hopefully demonstrated, while the right of appeal is an important aspect of due process, it has been severally curtailed in arbitration for the sake of finality and to prevent delay and to reduce costs and because it is in line with commercial expectations⁹¹¹. It makes sense for traditional commercial

⁹¹⁰ [1999] 2 Lloyd's Rep 222 (Comm)

⁹¹¹ As pointed out by W Park fn 40 11

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arbitration, if the parties are aware that by choosing arbitration they may limit the availability of an appeal, so that it can be said that they have waived recourse to the courts and appeal.

However the limitations on appeals may be more problematic in cases where the parties have not made a voluntary choice in bringing their case to arbitration. The limitation on appeals is also problematic if arbitration is becoming the predominant model of dispute resolution as it hinders the development of the law through the creation of precedent. This will be discussed further in the next Chapter.

8. Conclusion

Despite the rhetoric of due process rights, arbitrators effectively apply lower standards of due process than those applied by judges in litigation, due to the party autonomy and the waiver principles. On the one hand, lawyers express a concern for due process in arbitration as a general principle, on the other hand there is a need for procedural efficiency and flexibility which is expressed in the twin tenets of party autonomy and waiver of due process rights.⁹¹² This Chapter has attempted to expose this conflict between the twin principles of party autonomy and waiver on the one hand and due process on the other.

This Chapter has identified the main due process principles and examined to what extent they apply to arbitration and how they are implemented in the arbitration process. For this purpose the two classic elements of due process have been discussed, independence and impartiality of the arbitrators, and the fair hearing principle. The overall conclusion is that lesser standards in arbitration proceedings than in litigation are observed with respect to these two principles.

⁹¹² Similar findings by W Park fn 40 57: 'The emphasis on flexibility likely represents a Darwinian survival mechanism, helping institutions market themselves globally by sidestepping tough questions about what fairness means when legal cultures diverge.'

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In relation to the first of the two core principles of due process, *ie* independence and impartiality the courts have frequently asserted that the same standards as in litigation apply. As shown in this discussion, this is only rhetoric, as arbitration is in its very nature different from litigation before the courts. It has been explained that arbitrators in commercial arbitration cannot be independent in the same way as judges. This is a factor which is rarely (if ever) acknowledged by the (English) courts.

In relation to the second of the two core principles of due process, *ie* fair hearing it has been difficult to define *any* minimum standards which arbitration is required to meet. It *should be* acknowledged more openly that there exists a trade-off between fairness of procedure, and costs and delay. Since one of the declared goals of arbitration is to cut costs and delay, a curtailment of fairness in hearings standards is inevitable.

In addition, three aspects of what may be loosely called principles of accountability and transparency in political terminology have been examined: the duty to give reasons, privacy and confidentiality, and the right to an appeal. These latter three requirements are also important for due process, as they provide the checks and balances to ensure due process is complied with.

In relation to these three aspects of accountability and transparency, the courts not only openly acknowledge that there is a lesser duty in arbitration. On the contrary, it is frequently stated by the courts that it is in the very nature of arbitration that it is confidential or that there is only a limited right to judicial review and since these restrictions are immanent to arbitration it is assumed that the parties have waived their rights by agreeing to arbitration as a form of dispute resolution. The courts rarely discuss the procedural values, but tend to make an assumption that in arbitration there is no need for either accountability or transparency.

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To the extent that the courts admit that lesser due process rights apply, this is usually justified by the parties' choice of arbitration (waiver doctrine) and their control over the procedure (party autonomy). Hence an important justification for the application of fewer and lesser due process rights is the fact that the parties have chosen arbitration. As has been explained, under the jurisprudence relating to the ECHR, such a waiver is only effective if it was given voluntarily and well-informed. This will indeed be the case for most cases of commercial arbitration between business parties. However as arbitration expands as a form of dispute resolution into other sectors, waivers may not always be effective. In particular, where there is no recourse to the courts (because of lack of enforcement or because of costs) or in the case of non-negotiated, standard consumer contracts, the waiver doctrine *should not* apply. This will be discussed in Chapter Seven.⁹¹³ The intention of this Chapter is not to criticize traditional, commercial arbitration but to explore how arbitration as a process needs to be adapted to comply with the higher standards of due process for the Model of dispute resolution for internet disputes.

⁹¹³ 7-2

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Generally, nobody behaves decently when they have power.

(Kingsley Amis (1922-1995))

1. Introduction

As has been seen in Chapter Three⁹¹⁴, the internet as a communications medium harbours a great potential for an increase in cross-border disputes. These disputes may involve individuals, consumers and sole traders who, before the arrival of the internet, were unlikely to be involved in cross-border disputes. It has been suggested in Chapter Four⁹¹⁵ that online arbitration could provide a suitable (binding) method of dispute resolution for many internet disputes. This raises the question under what circumstances such arbitration is fair.

The origins of arbitration are a method of dispute resolution for members of the same industry or trade. Traditionally, the parties were all business members of the same trading community, with shared sets of values.⁹¹⁶ The origins of arbitration can be contrasted with the nature of many internet disputants, who may not share a common background and may well be very diverse indeed.⁹¹⁷

In traditional commercial arbitration, parties have been allowed to value factors such as efficiency and speed over due process. The preceding Chapter has shown that less stringent due process standards have been applied in commercial

⁹¹⁴ 3-2

⁹¹⁵ 4-3

⁹¹⁶ M Budnitz 'Arbitration of Disputes between Consumers and Financial Institutions: A Serious Threat to Consumer Protection' (1995) 10 *Ohio State Journal on Dispute Resolution* 267-342. 318-319

⁹¹⁷ 3-2

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arbitration (compared to litigation) because of the twin tenets of party autonomy and the waiver doctrine.

It is argued in this Chapter that, if internet disputants have no other realistic option but to choose online arbitration, it cannot be said that they freely choose arbitration or that they have opted out of the state court system and hence, the waiver doctrine should not apply in the Model espoused here. Furthermore, if there is a power imbalance between the parties, and the 'stronger' party imposes its terms on the 'weaker' party, it is also difficult to argue that *both* parties have voluntarily chosen arbitration and opted out of litigation. In these cases, although arbitration is based on contract, it is not fully consensual (no voluntary, informed consent).⁹¹⁸ Finally, in such a situation of power imbalance, the doctrine of party autonomy is also deprived of its meaning, as only the 'stronger' party is truly autonomous.

To support this argument this Chapter examines two examples of arbitration in constellations where it cannot be said that both parties have freely chosen arbitration, where the procedure is mandatory (UDRP) and where they are of unequal bargaining power with one party imposing terms on the other (B2C arbitration). Although the relevant internet disputes in this thesis have been defined more widely than the B2C paradigm and although the consumer arbitration cases examined here do not exclusively arise from internet transactions, they serve as a useful example for arbitration between unequal parties.

The argument of this Chapter is that the principles of party autonomy and the waiver doctrine should have limited application to the relevant internet disputes. For the Model of dispute resolution espoused here traditional arbitration must be adapted.

⁹¹⁸ D Beyleveld and R Brownsword: 'it is implicit in the idea of consent that it should be given on a free and informed basis', *Consent in the Law* (Hart Oxford and Portland 2007) 130

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This Chapter also examines the restrictions placed on B2C arbitration by law to compensate for the fewer due process protections found in arbitration. It argues that a new paradigm has to be found. The traditional paradigm which applies lesser due process rights and at the same time restricts arbitration for certain relationships (such as B2C cases) has to be changed. The solution is not to restrict access to arbitration for such internet disputes, as access to *binding* dispute resolution is required, but to ensure that due process applies. Therefore, this section advances the argument that stricter due process standards should be applied to online arbitration of internet disputes (as defined in Chapter Three⁹¹⁹) than have hitherto been applied to offline, commercial arbitration between businesses.

The first example to support this contention is the use of arbitration clauses in consumer contracts.

2. Legal Controls on the Use of Arbitration Clauses in Consumer Contracts

An arbitration contract or clause involves a waiver of the right to go to court⁹²⁰ (which, as a waiver of a right, requires consent) and an agreement, by which the parties undertake an obligation to take part in the arbitration procedure (which also requires consent). This consent should be voluntary and fully informed.⁹²¹ However it is questionable whether in the B2C context, consent to arbitration complies with these requirements, as there may be a lack of choice of options⁹²² due to market failures caused by the imposition of standard contract terms by the more powerful (business) party.

⁹¹⁹ Parties subject to a power imbalance, as crystallized in the corporate entity-individual paradigm, see 3-6.3

⁹²⁰ See Chapter 6-2.5

⁹²¹ See fn 918

⁹²² The question here is whether the lack of choice is of such a nature as to mean that there is such pressure on the person that they feel forced to accept an option they would otherwise not have chosen, see D Beyleveld and R Brownsword fn 918 143

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In B2C e-commerce, where the supplier includes an arbitration clause in the standard form contract, the consumer is in a far inferior bargaining position. In fact it can be said that the consumer is in no bargaining position at all, as the contract is offered on a 'take it, or leave it' basis. It is also likely that the consumer has not read the standard terms and conditions (even if there was a clear link from the ordering webpage) and thus that the consumer is not even aware that there is an arbitration clause in the contract.⁹²³ Another reason consumers are likely to be unaware of the arbitration clause in the contract is that they do not make their choices according to whether or not there is an arbitration clause in the contract, since at the stage of contract conclusion consumers are unlikely to give any thought to the issue of later disputes. Finally, even if the consumer has seen the clause, he or she may not appreciate its significance.

Consumers frequently have no real choice about the terms on which they contract, as different businesses use similar terms or a particular supplier may have a very strong market position. Consumer choice and market competition hence will not solve the problem of the consumer's inferior bargaining position. For these reasons, it is a fallacy to say that the consumer has chosen arbitration.⁹²⁴

A second imbalance in the relationship between consumer and supplier arises because the supplier chooses the arbitrator or, at least, the arbitration institution. Most likely the business is a 'repeat player', conducting numerous arbitrations each year and being familiar with the arbitration institution and the procedure. By contrast the consumer is the 'single shot' player who, in most cases, arbitrates only one case against this e-commerce supplier. This disadvantages the consumer substantially.⁹²⁵ In extreme cases, the arbitration institution might even (consciously

⁹²³ See also Case C-168/05 *Mostaza Claro v Centro Movil* [2007] 1 CMLR 22 (ECJ) para 25

⁹²⁴ J Sternlight fn 655 688, M Budnitz fn 916 321

⁹²⁵ This has been recognized explicitly in the recent US Court of Appeals decision *Ting v AT&T* 319 F3d 1126, 1151-1152 (9th Cir Cal 2003). Because of this disadvantage to the consumer, the court found an arbitration clause in an adhesion contract unenforceable. See also the discussion of repeat players in 3-5.2

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or not) regard the supplier as a repeat customer for referral and hence this might mean that there is some degree of (unconscious) systemic bias.⁹²⁶

Because of this lack of free choice and the repeat player effect, the law in some jurisdictions restricts the enforceability of pre-dispute arbitration clauses.

Furthermore consumer groups have long argued that consumers should not be bound by pre-dispute arbitration clauses.⁹²⁷

The law makes an important distinction between pre-and post-dispute arbitration agreements. A B2C arbitration agreement entered into before the dispute has arisen is potentially unfair, as at that point the consumer is likely to be unaware of its significance. The consumer is not likely to think of a possible dispute at this stage, nor to envisage that he or she may need an avenue of redress later on. By contrast, after a dispute has arisen, the consumer is likely to think about different dispute resolution options and if, at that point, he or she chooses not to go to court, but to try arbitration instead, then there is no reason why the law should not accept such a choice. Hence, generally speaking most laws restrict (in some way) the enforceability of pre-dispute arbitration clauses against a consumer, but only very few jurisdictions do not allow a B2C arbitration agreement *after* the dispute has arisen.⁹²⁸

The question of whether a pre-dispute B2C arbitration agreement is enforceable against a consumer can arise in different contexts and this raises the question of which law will apply to the question of whether the arbitration agreement is

⁹²⁶ Further 3-5.2, discussion of independence 6-3

⁹²⁷ M Doyle et al fn 424 78; see also Consumers International fn 432 29-30 (Recommendations) and see also Principle VI, 2nd Sentence of EC Recommendation 98/257/EC; see also the AAA Consumer- Related Disputes Supplementary Procedures of 15. September 2005, available from <http://www.adr.org/sp.asp?id=22014> [14. September 2007] and the AAA Due Process Protocol for Consumers Principle 5; BEUC Position Paper 'Alternative Dispute Resolution' of 21. November 2002 BEUC X/048/2002, pp.5-6; TACD (Transatlantic Consumer Dialogue) 'Alternative Dispute Resolution in the Context of E-commerce' Position Statement of February 2000, E-comm 12-00, Resolution No 4 available from <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=41> [14. September 2007]; Bamford fn 790 110; OECD Report fn 430 20

⁹²⁸ G Kaufmann-Kohler, T Schultz fn 224 173; French Civil Code, Art.2061 states that domestic pre-dispute arbitration agreements with consumers are invalid, see below for the position in the UK and the US.

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enforceable or not.⁹²⁹ It may arise when the consumer starts litigation before his or her national court and the defendant business claims that the court has no jurisdiction because of the arbitration agreement. In this situation the court may apply the law of the forum (*ie* its national law) on the basis of mandatory consumer protection law overriding the law of the arbitration agreement.⁹³⁰ The question may also arise before the courts at the seat of the arbitration, if the consumer challenges the jurisdiction of the arbitration tribunal, under the law chosen by the parties or the law of the seat.⁹³¹ Finally once an award (or a judgment) has been rendered, the issue may again arise in enforcement proceedings at the place where the defendant has assets. The enforcement court is likely to apply the law chosen by the parties⁹³² and/or the provisions of the New York Convention⁹³³.

2.1 Subject-matter arbitrability

Arbitrability refers to the question of whether a particular type of dispute may be submitted to arbitration. States may reserve certain types of disputes to the exclusive domain of the courts, for reasons of public policy or the public interest.⁹³⁴ If a particular category of disputes is not arbitrable, then a dispute falling into that category can never be submitted to arbitration, regardless of the consent of the parties. It seems that consumer disputes can be submitted to arbitration in principle, subject to conditions. In other words the laws of most jurisdictions impose conditions on the giving of consent, but do not exclude consumer arbitration agreements from arbitration altogether.⁹³⁵ In jurisdictions allowing the enforcement

⁹²⁹ Applicable law is discussed in 4-4

⁹³⁰ *Richard Zellner v Phillip Alexander Securities and Futures Ltd* [1997] ILPr 716, 724; see also s.89 (3) of the Arbitration Act 1996: 'whatever the law applicable to the arbitration agreement'

⁹³¹ A Redfern, M Hunter fn 270 148-151, G Kaufmann-Kohler, T Schultz fn 224 174

⁹³² *Ibid* and *Richard Zellner v Phillip Alexander Securities and Futures Ltd* [1997] ILPr 730 (QB) 736-738

⁹³³ Art.V (1) (a), Art.V (2) (a) or Art.V (2) (b). This will depend on the legal categorisation of consumer disputes in the jurisdiction of recognition and enforcement. This Chapter considers the UK and US position.

⁹³⁴ A Redfern, M Hunter fn 270 163; G Kaufmann-Kohler, T Schultz fn 224 170

⁹³⁵ G Kaufmann-Kohler, T Schultz fn 224 170-172: for example the German civil procedure code (ZPO) imposes specific form requirements on consumer arbitration agreements in para 1031 (5) (contained in a separate signed document or have certification by a notary public). as to the position in England and the

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of post-dispute arbitration agreements it can also not be said that consumer disputes are not arbitrable.⁹³⁶ It has been pointed out that limitations on arbitrability have been pushed back successively for the reason that judges perceive arbitration as a method to relieve the case overload of the ordinary courts.⁹³⁷

2.2 Control of consumer arbitration under English law

2.2.1 Small claims disputes

In England and Wales an arbitration agreement concluded with a consumer (whether pre- or post-dispute)⁹³⁸ is considered to be unfair and hence unenforceable⁹³⁹, if the claim does not exceed £5,000.⁹⁴⁰ Hence, under English law, if the amount in dispute is no more than £ 5,000⁹⁴¹ a pre-dispute arbitration clause is automatically not binding on consumers, without the need for applying any of the tests set out in Directive 93/13/EEC on unfair terms in consumer contract, implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1999.

US, see next section. *V Heiskanen* puts forward the view that consumer disputes are not arbitrable (quoting Finland as an example), *V Heiskanen* fn 107 31

⁹³⁶ For example in France the law distinguishes between a pre-dispute arbitration clause ('clause compromissoire') and a post-dispute arbitration agreement ('compromis'). The pre-dispute arbitration clause is only valid between merchants and professionals, Code Civile Art.2061, Code Commercial Art.631

⁹³⁷ *W Park* fn 40 25-26

⁹³⁸ S.89 (1) Arbitration Act 1996 'present or future disputes or differences (whether or not contractual)'

⁹³⁹ Such a clause would not be binding on the consumer, but binding on the business supplier, Regulation 8 (1) Unfair Terms in Consumer Contracts Regulations 1999

⁹⁴⁰ Arbitration Act 1996, s. 91 (1) and Unfair Arbitration Agreements (Specified Amounts) Order 1999/2167, Art.3. S.1 (1) Consumer Arbitration Agreements Act 1988 used to contain a complete prohibition of all domestic pre-dispute arbitration clauses in consumer contracts, but this has been repealed by the 1996 Act

⁹⁴¹ This amount can be changed by statutory instrument. It seems that this amount tallies with the upper-limit for the small claims procedure. The policy behind this is that up to this amount it may be better for the consumer to choose the statutory small claims procedure, whereas for larger amounts in dispute, arbitration may, under certain circumstances actually be in the consumer's interest.

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2.2.2 Regulation of unfair contract terms

If the amount in dispute exceeds that sum, the tests in the Directive and the Regulations apply to assess whether the arbitration clause is binding on the consumer.⁹⁴² If the arbitration clause is considered unfair it is not binding on the consumer, but may still be binding on the business.⁹⁴³

(a) Example in the Annex to the Directive

The example (q) in the Annex to the Directive and the Regulations is the most relevant example of an unfair term:

‘excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions’.

The meaning of the phrase ‘arbitration not covered by legal provisions’ is not entirely clear and several interpretations are possible. One interpretation could be that this phrase distinguishes private arbitration from public forms of ‘arbitration’, such as the small claims procedure or a statutory Ombudsman scheme. On the other hand, it could refer to a distinction between arbitration based on the applicable law and arbitration where the arbitrator does not base his or her decision on strict law. It seems that the courts have interpreted the clause to mean the former.⁹⁴⁴

In a recent case the ECJ held that if a pre-dispute arbitration clause is held to be unfair by the national court the award has to be annulled, even if the consumer has failed to raise the unfair nature of the term during the arbitration proceedings, the reason for which may be that the consumer is unaware of his or her rights or that the

⁹⁴² Christopher Drahozal and Raymond Friel ‘A Comparative View of Consumer Arbitration’ (2005) 71 *Arbitration* 131-139, 134; OFT ‘Unfair Contract Terms Guidance’ (February 2001), paras 17.2, 17.3

⁹⁴³ Art.6 (1) Directive, Regulation 8 (1)

⁹⁴⁴ By implication: Landgericht Krefeld Case 6 O 186/95. Judgment of 29. April 1996 [1997] ILPr 716; *Picardi v Cuniberti* [2002] EWHC 2923 (QB) para 102

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consumer is deterred from enforcing then on account of the costs which judicial proceedings would involve.⁹⁴⁵

It is also interesting to note that Recommendation 98/257/EC also provides in Article 4 that consumers should not be bound by a pre-dispute arbitration clause.⁹⁴⁶

(b) The fairness test

In any case, Article 3 (3) of the Directive makes it clear that the examples in the Annex are only indicative and hence a case-by-case assessment has to be made in order to see whether (1) the arbitration clause has been individually negotiated, (2) is contrary to the requirement of good faith and (3) causes an imbalance in the parties' rights and obligations to the detriment of the consumer.⁹⁴⁷ The courts must also take into account the nature of the goods and services for which the contract was concluded, the other terms of the contract and also all circumstances occurring at the point the contract was concluded.⁹⁴⁸

A mere explanation or the pointing out of an onerous clause in the consumer contract may be necessary to ensure incorporation under the common law, but will *not* be sufficient to render the clause fair or, for that matter, 'individually negotiated'. Pre-formulated terms, which the consumer has not been able to influence are never 'individually negotiated'.⁹⁴⁹

The two core elements of the assessment to see whether a term is fair or unfair are the imbalance and the contrary to good faith requirements. These elements have been interpreted by the House of Lords in the case *Director-General of Fair Trading v First National Bank plc*⁹⁵⁰. Lord Bingham described the imbalance test by

⁹⁴⁵ Case C-168/05 *Mostaza Claro v Centro Movil* [2007] 1 CMLR 22 (ECJ) paras 29-30

⁹⁴⁶ Recommendations have no binding force

⁹⁴⁷ Art.3 (1) Directive and Regulation 5 (1) Unfair Terms in Consumer Contracts Regulations 1999

⁹⁴⁸ Art.4 (1) Directive and Regulation 6 (1)

⁹⁴⁹ Art.3 (2) Directive and Regulation 5 (2)

⁹⁵⁰ [2002] 1 AC 481 (HL)

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the question: is the term weighted in favour of the supplier so as to tilt the parties' rights and obligations under the contract?⁹⁵¹ *Lord Millett*, in the same case, approached the assessment from a practical standpoint by asking whether, the parties would have accepted the term, if their attention had been drawn to the term.⁹⁵² The assessment has both a procedural and substantive element and is not limited to an inquiry of whether the term has been brought to the consumer's attention, but in addition whether it is substantially fair.⁹⁵³ What does this mean in the context of pre-dispute consumer arbitration clauses?

(c) Substantial fairness in the context of pre-dispute arbitration clauses

In the context of construction adjudication, *pre-dispute* adjudication clauses have been upheld where the consumer had received competent and independent professional advice for example from the surveyor.⁹⁵⁴ In these cases the courts seem to have equated the requirement of good faith with the requirement that the consumer is fully informed about the consequences of adjudication.⁹⁵⁵

By contrast in *Picardi v Cuniberti* the Court has held that an arbitration clause in a contract between an architect and a consumer is an onerous term which must be drawn to the specific attention of the consumer and that the term had therefore not been validly incorporated.⁹⁵⁶ The Court also held (*obiter*) that the arbitration clause was an unfair term and that it is an example of a significant imbalance to the detriment of the consumer⁹⁵⁷, as it may hinder the consumer's right to take legal action⁹⁵⁸. In that case the consumers had not been professionally advised.

⁹⁵¹ para 17

⁹⁵² para 54

⁹⁵³ [2002] 1 AC 481 (HL) paras 17 (Lord Bingham), 36-37 (Lord Steyn)

⁹⁵⁴ *Allen Wilson Shopfitters and Builders v Buckingham* [2005] EWHC 1165 (TCC) para 43; *Westminster Building Company Limited v Beckingham* [2004] BLR 163 (TCC) para 31

⁹⁵⁵ *ibid*

⁹⁵⁶ [2002] EWHC 2923 (QB) para 127

⁹⁵⁷ [2002] EWHC 2923 (QB) para 128

⁹⁵⁸ *ibid*

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The litigation in the case of *Richard Zellner v Phillip Alexander Securities and Futures Ltd* before the German Landgericht (District Court) Krefeld and the English High Court is another example where an arbitration clause in an agreement with a consumer has been held an unfair, and hence, unenforceable term. The claimant, a German consumer had been solicited by cold-calling into entering a futures and options agreement, under which he lost a substantial sum of money. One of the clauses in the agreement provided for arbitration in London before the LCIA under English law. The German court applied German mandatory consumer protection law and held that the term was unfair as it deprived the consumer of access to his local court and since the term was hidden in small print extending over several pages, it had the effect of ‘duping’ the consumer.⁹⁵⁹ The claimant won the case and moved to enforce the judgment in England by registering it with the English High Court. The defendant appealed against the Master’s Order for registration, again arguing that the German Court had no jurisdiction because of the arbitration agreement. On appeal, the English High Court had to assess the validity of the arbitration agreement, this time under English law. It also came to the conclusion that the arbitration agreement was invalid.⁹⁶⁰

2.2.3 Conclusion: English law

It is clear from this discussion that an arbitration clause can be an unfair term, depending on the circumstances, as it may deprive the consumer of access to national courts and application of mandatory consumer protection norms.

⁹⁵⁹ Landgericht Krefeld Case 6 O 186/95, Judgment of 29. April 1996 [1997] ILPr 716, 724; the Court applied the German law and referred to Directive 93/13 on unfair terms in consumer contracts, which at that point only had indirect application, as it had not yet been implemented into German law.

⁹⁶⁰ [1997] ILPr 730 (QB) 736-738; the English Court did not refer to Directive 1993/13 on unfair contract terms which at that point had not been implemented in the UK. Instead it based its findings that the arbitration agreement was invalid on s. 1 (1) Consumer Arbitration Agreements Act 1988, which provided that pre-dispute consumer arbitration agreements were unenforceable. S.2 (a) of the Act limited this to domestic agreements- however the Court found that s.2 (a) was discriminatory against EU citizens and hence should not be applied. The Consumer Arbitration Agreements Act 1988 and its blanket prohibition on pre-dispute consumer arbitration agreements has been repealed by the Arbitration Act 1996.

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Some of the English cases have made a distinction between a professionally advised consumer who would be bound by the arbitration clause, and a consumer who is not advised and hence would not be bound. The validity of this distinction is doubtful, since the purpose of the regulation of unfair contract terms is not merely to ensure that the consumer is properly informed. The concern of the legislation is also to counterbalance the power imbalance between consumers and businesses and the one-sided imposition of standard terms. To focus merely on information ignores the requirement of fair dealing set out in *Director-General of Fair Trading v First National Bank plc*.

However it is important not to make too much of the case law based on construction cases, as the interpretation of what amounts to an unfair term depends on the context⁹⁶¹ and the answer may well be different for internet and, in particular e-commerce disputes.⁹⁶² For claims above the £5000 threshold, it is ultimately not clear whether a pre-dispute arbitration clause, for example contained in standard terms on a website, would be binding on the consumer or not. It is argued here that the courts will interpret the Regulations to see whether the consumer has not only understood the arbitration clause, but also whether the clause deprives the consumer of mandatory consumer protection law⁹⁶³ or due process on a case-by-case analysis.

Therefore English law restricts the use of pre-dispute arbitration clauses considerably, thus acknowledging that consumers must be 'protected' from the lesser due process standards of arbitration and be given the choice to go to court.

⁹⁶¹ Art.4 (1) Directive and Regulation 6 (1)

⁹⁶² The argument advanced here is that arbitration clauses should not be regarded as unfair, if and only if arbitration respects due process. This could be achieved by interpreting the unfair contract term provisions accordingly.

⁹⁶³ See 4-4.5

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In a similar vein, it is likely that an English court would for public policy reasons refuse enforcement of an arbitration award which had been based on an unfair arbitration agreement in a standard term contract.⁹⁶⁴

2.3 Control of adhesion contracts under US State law

By contrast to England/the EU, in the US arbitration clauses in a written contract with a consumer are usually enforceable.⁹⁶⁵ There is a strong presumption in favour of arbitration under the Federal Arbitration Act⁹⁶⁶. This has been shown in cases concerning specific *State* consumer protection legislation⁹⁶⁷ providing for mandatory, non-waivable consumer rights, where the courts have validated the arbitration clause, even if it had the effect of depriving the consumer of these rights.⁹⁶⁸

However, an arbitration clause in a consumer contract must have been brought to the consumer's attention. In *Specht v Netscape Communications Corp*⁹⁶⁹ the courts have made a distinction between 'browse wrap contracts' and 'click wrap contracts'. The Court found that the arbitration clause was not incorporated in a browse wrap contract, as the consumer may have not followed the link to the terms and conditions.⁹⁷⁰

⁹⁶⁴ *Richard Zellner v Phillip Alexander Securities and Futures Ltd* [1997] ILPr 730 (QB) 736-738; discussed above, although this case was about the enforcement of a German court judgment, it discussed the validity of the arbitration agreement and found it unenforceable.

⁹⁶⁵ T Carbonneau fn 471 19; *Allied-Bruce Terminix Cos v Dobson* 513 US 265, 115 S Ct 834 (1995) 281-282

⁹⁶⁶ 9 USC § 2: an arbitration agreement 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract'. However *Jean Sternlight* has found that this preference for arbitration was not part of the original intent of Congress, but a myth developed by later courts out of a misguided policy to deal with overburdened courts, J Sternlight fn 655 644-656, 660-674, similar M Budnitz fn 916 289-290

⁹⁶⁷ Because of the supremacy of federal law see also T Carbonneau fn 471 27

⁹⁶⁸ *Commerce Park at DFW Freeport v Mardian Constr Co* 729 F.2d 334, 338-339; 39 Fed.R.Serv.2d 134 (5th Cir 1984); *Marley v Drexel Burnham Lambert Inc* 566 F Supp 333, 335 (1983 ND Texas). *Ting v AT&T* 319 F3d 1126, 1147-1148 (9th Cir Cal 2003) (arbitration clause held unenforceable for other reason)

⁹⁶⁹ 306 F3d 17, 48 UCC Rep Serv 2d 761 (2nd Cir 2002)

⁹⁷⁰ 30-33, 35

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Furthermore under general State contract law, a term in a consumer contract can be unenforceable if it is procedurally and substantially unconscionable and this doctrine of unconscionability equally applies to arbitration agreements, notwithstanding the Federal Arbitration Act's pro-arbitration stance.⁹⁷¹ A term is procedurally unconscionable if it is in a contract of adhesion, which is a standard term contract drafted by a party with a superior bargaining position.⁹⁷² However, the mere fact that an arbitration clause is contained in a standard contract does *not* make the arbitration agreement unenforceable against the consumer. An additional factor is required in that the term must also be substantively unconscionable.⁹⁷³ Substantive unconscionability is concerned with the one-sided nature of the contract and its oppressiveness, looking at the actual effects of the challenged provision.⁹⁷⁴ Such one-sidedness can stem from the fact that the consumer has to bear an excessive filing-fee, the fact that the consumers cannot resort to class-action or that the process is confidential, hence enhancing the repeat-player effect⁹⁷⁵. A clause restricting the consumer's avenue of redress to arbitration, while allowing the company the choice to litigate would also be invalid for the same reason.⁹⁷⁶

The courts have held in several decisions⁹⁷⁷ that an arbitration agreement in a consumer contract that forces the consumer to incur *excessive* arbitration fees is unconscionable. For example, in the much-cited case of *Brower v Gateway Inc*⁹⁷⁸

⁹⁷¹ Court decisions finding arbitration agreements unconscionable and unenforceable have been relatively common in the state and federal courts in California, see T Carbonneau fn 471 27

⁹⁷² *Eg Ting v AT&T* 319 F3d 1126, 1148 (9th Cir Cal 2003),

⁹⁷³ *Iberia Credit Bureau v Cingular Wireless LLC, Sprint Spectrum Company, Centennial Wireless* 379 F3d 159, 167-168 (5th Cir 2004)

⁹⁷⁴ *Ting v AT&T* 319 F3d 1126, 1149 (9th Cir Cal 2003)

⁹⁷⁵ *Ting v AT&T* 319 F3d 1126, 1151-1152 (9th Cir Cal 2003) but different in *Iberia Credit Bureau v Cingular Wireless LLC, Sprint Spectrum Company, Centennial Wireless* 379 F3d 159, 175-176 (5th Cir 2004)

⁹⁷⁶ *Iberia Credit Bureau v Cingular Wireless LLC, Sprint Spectrum Company, Centennial Wireless* 379 F3d 159, 168-169 (5th Cir 2004)

⁹⁷⁷ *Brower v Gateway2000 Inc* 676 N.Y.S. 2d 569, 572 (1998); *Green Tree Financial v Randolph*, 531 US 79, 81; 121 S.Ct. 513, 517 (2000) (in this case the US Supreme Court accepted that prohibitive costs may invalidate an arbitration agreement against a consumer, but the Court was not convinced that the petitioner would in fact incur such costs); *Knepp v Credit Acceptance Corp.* 229 B.R. 821, 838 (1999), *Patterson v ITT Consumer Fin. Corp.* 18 Cal. Rptr. 2d 563, 565-567 (1993), *Gutierrez v Autowest Inc* 114 Cal.App.4th 77, 86 (Cal App 2003), *Ting v AT&T* 319 F3d 1126, 1151 (9th Cir Cal 2003)

⁹⁷⁸ *Brower v Gateway2000 Inc* 676 N.Y.S. 2d 569, 572 (1998)

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involving the purchase of a personal computer and related software products⁹⁷⁹, the arbitration agreement stipulated arbitration before the ICC Court of Arbitration. The ICC advance fee for the claim was the amount of US\$ 4,000, of which US\$ 2,000 were non-refundable. The New York Appellate Court held that the arbitration agreement was unenforceable and remanded the case back to a lower court to encourage the parties to find an appropriate arbitration procedure for their small claims dispute. In the US, the American Arbitration Association has introduced specific fee schedules for consumer disputes.⁹⁸⁰

In another line of cases the courts have held an arbitration clause to be unenforceable against a consumer, if it prevented consumers to resort to class action, which existed as a right under State law.⁹⁸¹

In summary it can be said that if the arbitration agreement provides for an accessible and affordable forum, it will be enforced against a consumer.⁹⁸² The underlying approach in the US is that arbitration is as effective as court proceedings in adjudicating disputes and that arbitration may be in the parties' and society's interest.⁹⁸³

⁹⁷⁹ Value of the claim was on average about US\$ 1,000

⁹⁸⁰ Arbitration Rules for the Resolution of Consumer Related Disputes of 15. March 2001, the consumer must pay a fee of US \$ 125 (for small claims under US \$ 10,000).

⁹⁸¹ *Ting v AT&T* 319 F3d 1126, 1150 (9th Cir Cal 2003); *Ingle v Circuit City Stores* 328 F3d 1165, 1175-1176 (9th Cir 2003); *Szetela v Discover Bank* 118 Cal Rptr 2d 862, 867-868 (Ct App 2002); *Discover Bank v Superior Court* 36 Cal4th 148, 162 (2005); *Dana Klussman v Cross Country Bank* 134 Cal App 4th 1283, 1291, 36 Cal Rptr 3d 728, 733-734 (Cal App 2005); *Aral v Earthlink* 134 Cal App4th 544, 564, 36 CalRptr3d 229 (Cal App 2 Dist 2005) but different: *Charles Provencher v Dell Inc* 409 F Supp 2d 1196 (US District Court CD California 2006). In the *Discover Bank* case the Court said that an arbitration clause is unenforceable if found 'in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers'. The judge in the *Provencher* case distinguished this case on its facts, by finding that there was no blanket policy in California against class action waivers in the consumer context 1201. The Court in the *Provencher* case found on the facts that the arbitration clause and class action waiver did not deprive the consumer of effective redress and did not exempt Dell from the consequences of any alleged wrongdoing 1202-1203. The Court upheld the validity of the clause, 1203-1204; similarly, in *Iberia Credit Bureau v Cingular Wireless LLC, Sprint Spectrum Company, Centennial Wireless* 379 F3d 159, 174-175 (5th Cir 2004) the Court also found that the bar on class actions is also insufficient to render an arbitration clause automatically unconscionable.

⁹⁸² *Charles Provencher v Dell Inc* 409 F Supp 2d 1196 (US District Court CD California 2006) 1202-1203

⁹⁸³ T Carbonneau fn 471 19

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Nevertheless, where an arbitration agreement in an adhesion contract deprives the consumer of access to a forum to vindicate his or her rights, an arbitration clause may be struck out. Hence some restrictions against consumer arbitration agreements exist also under the US approach. However these restrictions are insufficient to guard consumers from unfairness⁹⁸⁴, as will be explained in the next section.

2.4 A critique of consumer arbitration

As explained in the preceding section, although there are some restrictions on arbitration clauses in adhesion contracts, on the whole there has been a presumption that arbitration agreements in such contracts are valid. This approach has been heavily criticised in legal literature.⁹⁸⁵

For example *Jean Sternlight* writes⁹⁸⁶:

‘In case after case since (...) 1983, the Supreme Court has reiterated that arbitration should be preferred over litigation. However, when the parties have not knowingly and voluntarily agreed to arbitration, this preference has no justification as a matter of legislative history, nor can it be defended as a matter of policy. Instead, such an arbitral preference simply allows stronger parties to take advantage of weaker parties.’

William Park has stated⁹⁸⁷:

‘The value of even-handed adjudication, which commends arbitration among sophisticated business managers, sometimes gets lost when form contracts are imposed on ill-informed individuals by manufacturers or employers with grossly

⁹⁸⁴ W Park fn 40 22-23

⁹⁸⁵ R Alderman ‘Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform’ (Winter 2001) 38 *Houston Law Review* 1237-1268, 1240-1242; P Carrington ‘Regulating Dispute Resolution Provisions in Adhesion Contracts’ (Winter 1998) 35 *Harvard Journal on Legislation* 225-231, 225-226; J Sternlight fn 655 704-705; M Budnitz fn 916 287; R Reuben fn 128 1032

⁹⁸⁶ J Sternlight fn 655 711

⁹⁸⁷ W Park fn 40 21

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disproportionate bargaining power. The result may be a distant forum of uncertain integrity.’

Therefore, calls have been made that pre-dispute arbitration agreements should be unenforceable unless there is a *voluntary and fully informed waiver*.⁹⁸⁸ The main problem with consumer arbitration agreements is that consumers have no real choice, as the arbitration clause is usually imposed on them.⁹⁸⁹

There are six factors which may potentially render arbitration as a process unfair to consumers. This does *not* mean that arbitration is *always* unfair to consumers, how these factors weigh against the efficiency gains described in Chapter Five⁹⁹⁰ depends on the circumstances of each case. Most of these factors have already been discussed in the general discussion of due process in Chapter Six. However, they will briefly be listed again here in the specific context of consumer arbitration as an example of a power imbalance situation and explain how they disadvantage consumers more than businesses.⁹⁹¹

2.4.1 The risk of systemic bias against consumer complainants

This has been discussed in great detail in Chapter Six and the reader is referred to that discussion.⁹⁹² The root causes for such systemic bias in the consumer context are the repeat player effect⁹⁹³ explained in Chapter Three⁹⁹⁴.

⁹⁸⁸ R Alderman fn 985 1264-1265; P Carrington fn 985 230-231; J Sternlight fn 655 705; M Budnitz fn 916 333-335; R Reuben fn 128 1032

⁹⁸⁹ R Alderman fn 985 1240, 1246 et sequi; P Carrington fn 985 226; J Sternlight fn 655 676-677

⁹⁹⁰ 5-5.2

⁹⁹¹ In this discussion I rely mainly on US sources and literature, as in the UK mandatory pre-dispute arbitration clauses are frequently not binding (see the last section). In the US consumers are also disadvantaged as arbitration deprives them of the benefits of class action, and in some areas, also of the benefit of punitive damages, see for a discussion of this M Budnitz fn 916 285-286. Since these are features specific to the US litigation systems, they will not be further discussed here.

⁹⁹² 6-3

⁹⁹³ J Sternlight fn 655 678-679, 684-685; M Budnitz fn 916 294

⁹⁹⁴ 3-5.2

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It has been explained in Chapter Six that the concept of a fair hearing is a flexible one and that in arbitration particularly it is common practice to take short-cuts in the quantity and quality of evidence adduced.⁹⁹⁵ This sets the consumer in a B2C e-commerce dispute at a particular disadvantage, as usually the consumer has to pre-pay for any goods or services, so that if a dispute arises the consumer will be the claimant, who has to prove the facts to substantiate the claim.⁹⁹⁶

2.4.2 Transaction costs

Arbitration may or may not be cheaper than litigation. For consumer disputes it may well be that small claims proceedings are cheaper. The point is here that court judges need not be paid, whereas arbitrators must be paid (unless the business bears all the cost). If the arbitration agreement applies a law foreign to the consumer, he or she may incur additional cost in obtaining foreign legal advice.⁹⁹⁷

2.4.3 Confidentiality

In Chapter Six I have also discussed the implications of confidentiality for due process.⁹⁹⁸ The first main point is that confidentiality exacerbates the informational inequality between the parties.⁹⁹⁹ Secondly confidentiality deprives the law of a precedent. If there is no precedent the law cannot develop in a coherent fashion.¹⁰⁰⁰ If there are no cases interpreting consumer protection legislation it can be argued that this disadvantages consumers generally, as it makes consumer protection legislation less effective.¹⁰⁰¹ Thirdly the non-publication of arbitration awards

⁹⁹⁵ 6-4

⁹⁹⁶ J Sternlight fn 655 678-679, 683-684; M Budnitz fn 916 311, 314; E Thornburg fn 641 206-207

⁹⁹⁷ R Alderman fn 985 1241-1242, 1249 et sequi; J Sternlight fn 655 678-679, 682-683

⁹⁹⁸ 6-6

⁹⁹⁹ M Budnitz fn 916 285, 287

¹⁰⁰⁰ 6-6.1.3

¹⁰⁰¹ R Alderman fn 985 1242, 1258, 1262 et sequi; P Carrington 985 229

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means that there is not the same scrutiny and criticism of awards as there is with public judgments.¹⁰⁰²

2.4.4 No reasons and no appeal

The arbitration agreement a business imposes on a consumer may well provide that no reasons should be given and that the award is final. The implications of this have been discussed in Chapter Six¹⁰⁰³. This is problematic, since this renunciation of rights has been imposed by one side, and may disadvantage the consumer as claimant disproportionately because of the repeat player effect^{1004 1005}.

2.4.5 Applicable law

The business may state in an arbitration agreement which law is to apply to the dispute, thereby defeating or curtailing mandatory consumer protection provisions, which may otherwise apply.¹⁰⁰⁶ Secondly since the judicial review of arbitration awards on the merits is limited, arbitrators may not properly apply the law¹⁰⁰⁷ and in particular they may not apply (foreign) mandatory consumer protection laws.¹⁰⁰⁸ These two factors mean that consumer protection law is less effective than it otherwise would be.¹⁰⁰⁹

2.4.6 One-sided procedure

Finally since the business acts as experienced repeat player and selects the arbitration institution and shapes the procedure to its own advantage, this further

¹⁰⁰² Mentioned by J Sternlight fn 655 678-679, 686; M Budnitz fn 916 327-328; E Thornburg fn 641 210-211; H Perritt fn 432 681

¹⁰⁰³ 6-5: 6-7

¹⁰⁰⁴ 6-6.1.1

¹⁰⁰⁵ J Sternlight fn 655 678-679, 686

¹⁰⁰⁶ 4-4.5

¹⁰⁰⁷ S Ware fn 316 719-720

¹⁰⁰⁸ E Thornburg fn 641 216

¹⁰⁰⁹ J Sternlight fn 655 678-679, 685; cf M Budnitz fn 916 285 doubts whether the fact that arbitrators do not have to apply strict law necessarily disadvantages consumers

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disadvantages the one-shot player consumer.¹⁰¹⁰ This puts the principle of party autonomy on its head, as in fact only *one* of the parties is autonomous. More generally it can be said that the principle of procedural party autonomy is problematic, if there is a great power imbalance between the parties.

2.5 Conclusion

As the example of consumer disputes has shown, *traditional, commercial* arbitration may not be the suitable paradigm for solving all disputes arising on the internet. In a situation of considerable power imbalance, such as consumer e-commerce disputes, there is no voluntary and informed waiver of due process. For internet disputes it is no solution to provide that pre-dispute arbitration clauses should not be binding, as this would deprive the weaker party of all access to redress, as the courts are not a viable or affordable option. This is even more the case where the parties are located at a distance or even in two different jurisdictions. Hence this is a Catch 22 situation for internet disputes: on the one hand traditional arbitration is not working to provide fair dispute resolution in a situation where there is a considerable power imbalance between the parties, such as consumer e-commerce disputes. On the other hand it is no good to simply limit the availability of arbitration in the online environment, as it is the only viable form of binding dispute resolution. Hence, the controls on arbitration clauses provided by the law on unfair contract terms (in the UK and the EU) or adhesion contracts (in the US) are not effective to ensure the fairness of arbitration and not sufficient to protect consumers. The outcome of this is that arbitration has to change for internet disputes- it has to reinvent itself to cater for a wider range of internet disputes and disputants. Arbitration has to comply with stricter due process standards, when employed for the solution of internet disputes, at least where there is a power imbalance between the parties. If online arbitration is the only viable binding dispute resolution procedure in many cases (and not only an alternative to

¹⁰¹⁰ R Alderman fn 985 1242, 1253 et sequi; P Carrington fn 985 226; J Sternlight fn 655 685; M Budnitz fn 916 293

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litigation), it is crucial that due process standards are incorporated into online arbitration of internet disputes, as waivers are not in fact voluntary or possible.

The second example for due process and arbitration of internet disputes is the UDRP.

3. UDRP as a Model for Online Dispute Resolution

This section describes the UDRP, analyses its procedural fairness and discusses to what extent this procedure could serve as a model for the resolution of internet disputes.

3.1 Brief description of the UDRP

ICANN, the body tasked with governing the internet domain name system by the US government, adopted the UDRP on 26. August 1999. The UDRP is designed to solve disputes between a trade mark owner and a domain name registrant¹⁰¹¹, where the registrant has registered a domain name identical or confusingly similar to the trade mark, the registrant has no rights or legitimate interests in the name and the registrant has registered and used the domain name in bad faith.¹⁰¹² The UDRP cannot be used to deal with conflicts between two trade mark holders or between a trade mark holder and a registrant who has rights or legitimate interests. In particular, the UDRP does not apply if the registrant has been known by the name or used it in connection with a bona fide offering of goods or services or for a legitimate non-commercial purpose.¹⁰¹³

The UDRP has been drafted narrowly to combat the internet phenomenon of cybersquatting, *ie* the registration of a domain name similar to a trade mark for an

¹⁰¹¹ For generic top-level domains such as .com and .biz

¹⁰¹² Paragraph 4 (a) UDRP as approved by ICANN on 24. October 1999, <http://www.icann.org/dndr/udrp/policy.htm> [14. September 2007]

¹⁰¹³ Paragraph 4 (c) UDRP as approved by ICANN on 24. October 1999, <http://www.icann.org/dndr/udrp/policy.htm> [14. September 2007]

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illegitimate purpose, such as selling the domain name to the trade mark owner or to a competitor of the trade mark owner, preventing the trade mark owner from reflecting the name in the corresponding domain, vexing the trade mark owner or in order to deflect traffic from the (famous) trade mark owner onto the registrant's own site, who may, by this last tactic increase traffic and advertising revenue.¹⁰¹⁴

A further discussion of the substantive issues of the UDRP is outside the scope of this thesis. Suffice to say here that the UDRP (and its associated rules) do not merely lay down the procedure for the dispute resolution, but also forms the applicable substantive law for the resolution of disputes within its scope. The main consideration in the design of the UDRP was to create a convenient, cost-effective and fast procedure to combat cybersquatting.¹⁰¹⁵

The UDRP as a procedure¹⁰¹⁶ is similar to arbitration in that a private adjudicator (a one or three member panel) produces a decision binding on the parties. However the procedure is not strictly speaking arbitration, as the decisions are not final and do not have *res judicata* effect between the parties¹⁰¹⁷. Either party can start proceedings before a competent court after the panel has produced a decision.¹⁰¹⁸

Like arbitration, the UDRP is based on a contractual regime. The UDRP has been described as a 'contractually-mandated private system for the benefit of non-

¹⁰¹⁴ Paragraph 4 (b) UDRP as approved by ICANN on 24. October 1999, <http://www.icann.org/dndr/udrp/policy.htm> [14. September 2007]; WIPO Case No D2006-0882 Geoffrey Inc v NOT THE USUAL

¹⁰¹⁵ Para 38 WIPO Report New Generic Top Level Domains: Intellectual Property Considerations

¹⁰¹⁶ The UDRP calls the procedure 'Mandatory Administrative Procedure'

¹⁰¹⁷ For the relationship between court proceedings and the UDRP see below. For arbitration the award disposes of the dispute between the parties, A Redfern, M Hunter fn 270 459; cf for the position under the UDRP, *Stenzel v. Pifer* WL 1419016 (District Court W.D.Wash 2006) Decision of 22. May 2006; *Storey v Cello Holdings LLC* 347 3Fd 370, 373-4, 381 (2nd Cir NY 2003); *Parisi v Netlearning Inc* 139 F Supp 2d 745, 752 (District Court ED Va 2001); *Sallen v. Corinthians Licenciamentos LTDA* 273 F3d 14, 26-27 (1st Circuit 2001); see also N Chatterjee 'Arbitration Proceedings under ICANN's Uniform Domain Name Dispute Resolution Policy- Myth or Reality' (2006) 10 *Vindobona Journal of International Commercial Law & Arbitration* 67-90, 86-87; C Emerson, 'Wasting Time in Cyberspace: The UDRP's Inefficient Approach Toward Arbitrating Internet Domain Name Disputes' (2004) 34 *University of Baltimore Law Review* 161-197, 177

¹⁰¹⁸ Paragraph 4 (k) UDRP

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contracting parties’¹⁰¹⁹. This works as follows. The domain name registrant has agreed to submit disputes to the UDRP regime under the terms of the contract between the domain name registrar and the domain name registrant. However this agreement is in no sense voluntary. ICANN, as the ultimate regulator of the domain name system, has imposed a requirement on each domain name registrar to incorporate the UDRP into their contracts with their customers. The UDRP is a regulatory dispute resolution scheme implemented by a chain of contracts.¹⁰²⁰

Furthermore, the decisions are also binding, since they are enforced by action of the registrar if neither party commences litigation before the courts.¹⁰²¹ The registrars are contractually obliged (as part of their licence from ICANN) to comply with an order by a panel to cancel or transfer a domain name. Since the only remedy a panel can award is to cancel or transfer a domain name¹⁰²² (panels cannot order any other remedy such as damages), the order of a panel can directly be implemented by the registrar, who has the *de facto* power to cancel or transfer domain names. This means that the UDRP is self-enforcing¹⁰²³. While this is effective it creates the risk that the process is not seen as legitimate, if it does not comply with due process.¹⁰²⁴

To the extent that the UDRP lowers the hurdle for complainants by cutting the cost, time and effort to seek redress, it can be said that it shifts the burden to litigate before the courts from the trade mark holder to the domain name registrant, who has to go to court to prevent or remedy a transfer or cancellation of the name. However, the mere fact that the UDRP shifts the burden to litigate from the trade mark holder

¹⁰¹⁹ E Thornburg ‘Fast, Cheap and Out of Control: Lessons from the ICANN Dispute Resolution Process’ (Spring 2002) 6 *Journal of Small and Emerging Business Law* 191-233, 197

¹⁰²⁰ *Parisi v Netlearning Inc* 139 FSupp2d 745, 751 (District Court ED Va 2001); *Storey v Cello Holdings LLC* 347 3Fd 370, 381 (2nd Cir NY 2003)

¹⁰²¹ The UDRP states that the registrar waits ten days before implementing a decision to transfer or cancel the domain name in order to see whether the registrant commences court proceedings Para 4 (k). See also below 7-3.2.7

¹⁰²² Paragraph 4 (i) UDRP

¹⁰²³ In fact some courts have held that a UDRP decision cannot be enforced as an arbitration award. see for example in relation to para. 10 FAA *Parisi v Netlearning Inc* 139 F Supp 2d 745, 752 (District Court ED Va 2001); *Dluhos v. Strasberg*, 321 F.3d 365, 372-73 (3rd Circuit 2003)

¹⁰²⁴ L Helfer ‘Whither the UDRP: Autonomous, Americanized or Cosmopolitan?’ (2004) 12 *Cardozo Journal of International and Comparative Law* 493-505, 496

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to the domain name registrant within its (narrow) scope does not render the UDRP automatically unfair.¹⁰²⁵

Five¹⁰²⁶ dispute resolution service providers have received ICANN approval. At present, only three are deciding cases under the UDRP: the Arbitration and Mediation Center of WIPO¹⁰²⁷, the National Arbitration Forum (NAF)¹⁰²⁸ and the Asian Domain Name Dispute Resolution Centre (ADNDRC)¹⁰²⁹. The complainant trade mark owner selects which of the dispute resolution service providers should hear the case.¹⁰³⁰

For .eu domain names, the European Commission has set up, in conjunction with the .eu registry (EURID) a dispute resolution procedure clearly modelled on and almost identical to the UDRP.¹⁰³¹ The first (and to date only) dispute resolution provider accredited to resolve disputes under this .eu ADR policy¹⁰³² is the Czech Court of Arbitration¹⁰³³. In the text procedural variations will be pointed out, as they are relevant and significant for the due process discussion.

¹⁰²⁵ Suggested in E Thornburg fn 641 193 and the same author fn 1019 215-216

¹⁰²⁶ ICANN has approved a total of five dispute resolution service providers, however two of these have ceased to accept cases. E-Resolution has ceased operations on 30. November 2001. Recently (1. January 2007) CPR has also ceased to accept UDRP cases. This section refers to the CPR Rules, where they contained interesting points, but it should be noted that the scheme is not operative. CPR had registered 141 cases (including pending cases) until 11. July 2006. CPR has ceased to accept new UDRP cases since January 2007

¹⁰²⁷ WIPO has 8925 cases on its files (including pending cases) until 11. July 2006, see <http://arbiter.wipo.int/domains/statistics/cumulative/countries.html> [11. July 2006]

¹⁰²⁸ NAF has registered 6694 cases (including pending cases) until 11. July 2006 see <http://domains.adrforum.com/decision.aspx> [11. July 2006]

¹⁰²⁹ The Beijing office has had about 88 cases (including pending cases) until July 2006, the Hong-Kong office about 84 (including pending cases), see <http://www.adndrc.org/adndrc/index.html> [11. July 2006]

¹⁰³⁰ Paragraph 4 (d) UDRP

¹⁰³¹ See Articles 21-23 of Commission Regulation 874/2004 of 28. April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain, see OJ L162 of 30. April 2004 p.40

¹⁰³² Like the UDRP this does not compromise any mediation (unlike the Nominet procedure- Nominet claims to settle 60% of all its cases by mediation, see <http://www.nominet.org.uk/disputes/drs/>) [14. September 2007]

¹⁰³³ Appointed by EURID on 12. April 2005

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This sub-section has given a brief outline of the purpose and structure of the UDRP. The task of the next section is to provide a critique of the procedure from the viewpoint of due process.

3.2 A critique of the UDRP

This section analyses the due process issues arising from the UDRP.

3.2.1 Independence and impartiality

(a) Complainant win rates

Various studies have examined the statistical outcomes of UDRP decisions. *Milton Mueller* has found in his early study conducted in 2000 that trade mark owners succeed in obtaining the disputed domain name in about 80 per cent of the time on average across all dispute resolution service providers.¹⁰³⁴ Some six years later, this figure of the average percentage of complainant winning across all dispute resolution providers has increased to around 84 per cent.¹⁰³⁵ While these figures in themselves seem high, they do not, by themselves, evidence any unfairness in the procedure, as it is impossible to know what percentage of cases are ‘true’ cybersquatting cases.¹⁰³⁶

¹⁰³⁴ *M Mueller* ‘Rough Justice- an Analysis of ICANN’s Uniform Dispute Resolution Policy’ Research Report published by the Convergence Center, Syracuse University School of Information Studies dated November 2000, p.10 Table 3 (this does not take into account the cases settled or withdrawn) and published as ‘Rough justice: A Statistical assessment of ICANN’s Uniform Dispute Resolution Policy’ (2001) 17(3) *The Information Society* 153-163

¹⁰³⁵ The group of UDRP dispute resolution providers has changed since then, as ADNDRC has started to operate only in April 2002 and e-Resolution has gone out of business. However the lion share of the meat of cases is still heard by WIPO and NAF, see fn 1038. The author has examined the statistics of each provider as shown on the respective websites on 12. July 2006. This figure ignores not only pending cases but also any withdrawn cases or split decisions and is therefore higher than the figures detailed below fn 1040. This method has resulted in 10680 claimant win cases out of a total of 12675 cases (not counting withdrawn cases), equaling 84.3%.

¹⁰³⁶ It is impossible to judge the fairness of a procedure merely by the win-lose rate of a particular party. see also the discussion of fairness in 2-4

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More interesting is to compare the ‘complainant win’ rate of each dispute resolution provider with that provider’s market share. *Milton Mueller* found in 2000¹⁰³⁷ that the complainant success rate between the different providers varies considerably and that the two providers with the overwhelming market share have each much higher complainant success rates¹⁰³⁸ than the provider with the lowest market share¹⁰³⁹.¹⁰⁴⁰ He poses the question whether these figures are an indication for systemic bias, as the complainant selects the dispute resolution provider, who, as a consequence, has an incentive to appear to be ‘complainant-friendly’, in order to increase its market share.¹⁰⁴¹ In order to avoid such systemic problems, he recommends that, the registrar of the domain name concerned rather than the complainant should choose which dispute resolution provider hears the case.¹⁰⁴²

¹⁰³⁷ *M Mueller* fn 1034 14-16

¹⁰³⁸ WIPO- 67.5% and NAF- 71.5% complainant win rate (these figures include the withdrawn/settled cases), p.11 Table 4; WIPO- 61% and NAF 31% market share, p.14 Chart 4

¹⁰³⁹ e-Resolution complainants won in 44.2% of cases (this includes the withdrawn/settled cases) p.11 Table 4; e-Resolution market share 7%, p.14 Chart 4

¹⁰⁴⁰ Ignoring any pending cases, I have counted the number of decisions in which the domain name(s) was (were all) transferred or cancelled (claimant win) and the cases where the claim was denied (respondent win), as well as those cases, which were withdrawn or where the panel returned a split verdict, *ie* where there are several domain names and only some are transferred (neither claimant nor respondent wins). My analysis of the website data of 12. July 2006 (see fn 1035) has produced the following figures:

	WIPO	NAF	CPR	ADNDRC
Complainant win	66.3%	74.5%	54.2%	54.1%
Market share	55.9%	42.5%	0.9%	0.7%

This would tally with *Milton Mueller’s* figures- however I have *not* examined other factors such as price or country of origin of complainants.

¹⁰⁴¹ See fn 1034 18: ‘it proves that forum-shopping exists to some degree’. He also examined other factors such as price, which he concludes is not a strong explanatory factor (p. 15) and the complainant’s country of origin, which he found significant (NAF for US complainants; WIPO for complainants outside the US. p.17) and speed of decision (p.18). He nevertheless concludes that decision outcome is the strongest factor (p.18). See also M Halpern, A Mehrotra, ‘Exploring Legal Boundaries Within Cyberspace: What Law Controls in a Global Marketplace?’ (2000) 21 *University of Pennsylvania Journal of International Economic Law* 523-561, 558 and M Geist ‘Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP’ (2002) 27 *Brooklyn Journal of International Law* 903-937, 906 and M Froomkin, D Post *Froomkin and Post Send Letter to ICANN Board*, Letter of 26. January 2000 available from http://www.icannwatch.org/archive/post_froomkin_udrp_letter.htm [14. September 2007] and M Froomkin ‘ICANN’s Uniform Dispute Resolution Policy- Causes and (Partial) Cures’ (2002) 67 *Brooklyn Law Review* 608-718, 672-673

¹⁰⁴² See fn 1034 19-20; M Froomkin fn 1041 673: this, however may lead to the reverse problem that service providers have to appear to the registrant friendly.

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The claim, that forum shopping according to outcome leads to bias, while striking, should at least be questioned. It is difficult to demonstrate a clear and persuasive causal link between the forum shopping and the actual decision-making. This does not mean that such a link does not exist. Providers have an incentive to create the right perception about dispute outcomes in the minds of the complainants' advisors.

¹⁰⁴³ The incentive for providers to appear complainant-friendly *may furthermore indirectly* impact on the independence and impartiality of the panellists themselves, but this is extremely difficult to show.¹⁰⁴⁴ The provider's role is limited to providing administrative support.¹⁰⁴⁵ The following discussion will therefore mainly focus on the impartiality and independence of the panellists.

(b) Impartiality and independence of the panellists

First of all, it should be pointed out that the individual panellists are subject to an express obligation of independence and impartiality and have to declare any conflicts of interest.¹⁰⁴⁶

The panels have held that a panel must only recuse itself if there are grounds on the basis of which a reasonable, objective person would doubt the panellist's impartiality. This would be the case if the panellist had a conflict of interest, such as a financial interest or had represented a party or a third party in a dispute against one of the parties or where the panellist had demonstrated personal bias. The evidence relating to bias must establish more than just a hint or insinuation, it must establish serious doubt.¹⁰⁴⁷ This is roughly in line with the traditional jurisprudence on independence and impartiality outlined in Chapter Six.¹⁰⁴⁸

¹⁰⁴³ M Froomkin fn 1041 690; E Thornburg fn 1019 220

¹⁰⁴⁴ In the case WIPO Case No D2001-0558 *AFMA Inc v Globemedia* the panel pointed out that the provider's role is limited to the administration of cases and refused to accept that the provider can be biased.

¹⁰⁴⁵ See also the discussion of bias and the difficulty of proving actual bias in 6-3.1.1

¹⁰⁴⁶ Rule 7 Rules for the UDRP; Supplemental Rules: Art.9 ADNDRC, Art.7 CPR, Art.10 NAF and Art.8 WIPO

¹⁰⁴⁷ WIPO Case No D2001-0505 *Britannia Building Society v. Britannia Fraud Prevention*

¹⁰⁴⁸ 6-3

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However the UDRP rules do *not* expressly provide for a *challenge* of the panel by one of the parties before an independent third party on the grounds of lack of independence or partiality.¹⁰⁴⁹ Clearly a provision allowing either party to challenge the appointment of a panellist before an independent third party body, even after a decision has been made, is necessary to render these provisions effective in preventing the appointment of biased panellists.¹⁰⁵⁰ This independent body could be an appeals body¹⁰⁵¹ or a court.

Secondly, the providers can influence the outcome of decisions through the selection and allocation of panellists¹⁰⁵². For this reason it is necessary to examine in more detail *who* are the panellists and *how* are panellists allocated to a particular case.

(c) Selection of panellists

In connection with the question *who* the panellists are, it is important to address questions of *systemic* bias.¹⁰⁵³ For example, if *all* panellists were practising trade mark lawyers representing trade mark owners' interests in their professional capacity carrying out their 'day' job, it could be concluded that such panel composition is indicative for systemic bias, even if the individual panellist cannot be shown to be biased. Unsurprisingly, the panels themselves have not accepted any

¹⁰⁴⁹ Only the .eu ADR Rules and the NAF Rules expressly provide for a challenge of a panellist on the basis of lack of impartiality, independence or integrity, but then only before the institution itself and not an independent third party, see .eu ADR Rules, Rule 5 (c) –(e) and Rule 10 (c) – (e) NAF Rules available from

<http://domains.adrforum.com/main.aspx?itemID=631&hideBar=False&navID=237&news=26> [14. September 2007]

¹⁰⁵⁰ M Fromkin fn 1041 689; see the discussion about appeals, below 7-3.2.6

¹⁰⁵¹ See the discussion below

¹⁰⁵² As *Milton Mueller* points out himself, fn 1034 11

¹⁰⁵³ See discussion of *systemic* bias in 6-3.2.6

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arguments that trade mark lawyers should not sit on panels on the grounds of bias, since there was no sign of the *individual* panellist's bias.¹⁰⁵⁴

While in commercial arbitration it has been widely accepted that arbitrators are appointed who are active in the relevant sector¹⁰⁵⁵ the same should not be automatically assumed for the UDRP procedure, which is mandatory and public. *M Scott Donahey* also suggests that the requirements for appearance of impartiality have to be more stringent under the UDRP than in commercial arbitration, as

'the parties interested in the UDRP process are often private individuals with little experience with the litigation process or with trade mark law. The audience of the UDRP process is far more likely to find an appearance of impropriety in a given situation (...).'¹⁰⁵⁶

He argues, while asserting the actual integrity and impartiality of the panels, that it would be better if no panellists were representing clients in (other) UDRP procedures to avoid allegations of systemic bias. However he also argues that this is unrealistic, as it would effectively bar practitioners from serving as panellists.¹⁰⁵⁷

By way of example looking at the CVs of the panellists on the WIPO panel, it appears that the majority of them are indeed trade mark lawyers, but a significant proportion of panellists have a different background. For example, 48 panellists out of 391 are academics. This figure amounts to 12.3%.¹⁰⁵⁸ The bulk of panellists are trade mark lawyers. The high proportion of trade mark attorneys among UDRP

¹⁰⁵⁴ WIPO Case No D2001-0505 *Britannia Building Society v. Britannia Fraud Prevention*; WIPO Case No D2004-0535 *United Services Automobile Association v Ang Wa Assoc*

¹⁰⁵⁵ 6-3.2.3

¹⁰⁵⁶ M Scott Donahey 'The Uniform Domain Name Dispute Resolution Process and the Appearance of Partiality- Panelists Impaled on the Horns of a Dilemma' (2002) 19 (1) *Journal of International Arbitration* 33-38, 35

¹⁰⁵⁷ M Scott Donahey fn 1056 38

¹⁰⁵⁸ Looking at the list of WIPO panellists on the relevant website on 15. July 2006 and counting the panellists on the lists whose CV indicated that their main occupation is academic. It is fair to say that there is a lower likelihood of systemic pro-trade mark holder bias among academics than there is among trade mark lawyers (this is an assumption made).

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panellists should be criticised. A more balanced composition of the panel lists would be desirable.¹⁰⁵⁹

(d) Allocation of panellists

As to the question of *how* panellists are allocated to individual cases, *Michael Geist* found that this is an important and troubling aspect of the UDRP in this context.¹⁰⁶⁰ This raises the question whether, if appointment is left to the provider, providers are apt to appoint panellists who have shown pro-complainant leanings. This problem is mitigated if the parties influence the appointment of panellists.

At a minimum, the parties can decide whether the case should be heard by a one-member or three member panel.¹⁰⁶¹ However, the parties do not choose who ‘sits’ on the single member panel- panellists are appointed by the dispute resolution service provider.¹⁰⁶² If the complainant or the respondent decides that the case should be heard by a three member panel, each party should provide a list nominating three candidates for appointment and the provider selects one member from each list. The third member of the panel is determined from a list of five possible candidates drawn up by the provider, usually by each party deleting two names from that list.¹⁰⁶³ So for three member panels, the parties cannot appoint the panellists, but at least they have some degree of influence over panel composition.

Therefore, non-transparent or even biased panel allocation is more of an issue for single member panels, as for cases coming before three- member- panels, the

¹⁰⁵⁹ M Fromkin fn 1041 693; S Ware fn 316 163: looking at the CVs of the panelists used for the .eu domain name ADR it also seems the case that the majority of panelists are IP attorneys, see <http://www.adr.eu/adr/panelists/index.php> [14. September 2007]

¹⁰⁶⁰ M Geist fn 1041 911: ‘The study finds that influence over panel composition is likely the most important controlling factor in determining case outcomes.’

¹⁰⁶¹ UDRP Rules 3 (b) (iv) and 5 (b) (iv) available from <http://www.icann.org/dndr/udrp/uniform-rules.htm#3bxiii> [14. September 2007]

¹⁰⁶² UDRP Rule 6 (b) provides that a single panellist is appointed by the dispute resolution service provider. This is the same under the .eu domain name procedure, Rule 4 (b) .eu ADR Rules.

¹⁰⁶³ UDRP Rule 6 (e)

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parties have some influence over the panel appointment.¹⁰⁶⁴ *Michael Geist* examined the difference in the complainant-win rates for single member panels, with panel allocation being solely controlled by the provider, and for three-member panels, where the parties have some degree of control over who is appointed. This produced an astonishing result: for cases decided by sole panellists, complainants win in 83% of cases, whereas for three-member panels that rate drops considerably to 58%.¹⁰⁶⁵

He posits that the reason for this remarkable difference is that respondents have an input on who sits on the panel and that deliberation between the panellists results in more balanced decision-making.¹⁰⁶⁶ For this reason he recommends that all UDRP cases should be heard by three-member panels.¹⁰⁶⁷

The process for the appointment of single panellists is indeed not transparent. The UDRP Rules merely provide that, if no three member panel is requested, the dispute resolution provider selects the single panellist to decide the case.¹⁰⁶⁸ The WIPO Rules¹⁰⁶⁹ and the NAF Rules¹⁰⁷⁰ do not contain any supplemental provisions on the criteria to shed any light on the question of how single panel members are selected. The .eu ADR procedure also does not explain how panellists are appointed.¹⁰⁷¹

¹⁰⁶⁴ At least where the respondent takes part in the procedure

¹⁰⁶⁵ M Geist fn 1041 912, 922

¹⁰⁶⁶ He excluded other factors, such as the possibility that in three-member panel cases the respondent has a better case and hence elects a three member panel. He found that a significant number of three-member panels are requested by complainants and that in some cases where a three-member panel is requested by the complainant, the respondent defaults (which might indicate on the contrary that the respondent has a 'bad' case): M Geist fn 1041 923-926

¹⁰⁶⁷ M Geist fn 1041 930-931

¹⁰⁶⁸ UDRP Rule 6 (b)

¹⁰⁶⁹ WIPO Rules available from <http://arbiter.wipo.int/domains/rules/supplemental/index.html#7> [14. September 2007]

¹⁰⁷⁰ NAF Rules (Version 1. January 2006) available from <http://domains.adrforum.com/main.aspx?itemID=631&hideBar=False&navID=237&news=26> [14. September 2007]

¹⁰⁷¹ Rule 4 (a) merely states that 'the panelists shall be selected in accordance to the internal procedures of the Providers', .eu ADR Rules

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Interestingly, the ADNDRC Rules make an exception in stating that panellists shall be appointed according to the following benchmarks¹⁰⁷²:

- (i) the nature of the dispute,
- (ii) the availability of the panellist,
- (iii) the identity of the parties,
- (iv) the independence and impartiality of the panellist,
- (v) any stipulation in the registration agreement and
- (vi) any suggestions made by the parties themselves.

While it is laudable that the ADNDRC has attempted to formulate criteria for the selection of panellists in order to make the process more transparent, looking at the criteria more closely, it is questionable how useful they are, as they are vague. It is unclear how criterion (i), the nature of the dispute, should influence the selection. Furthermore the question must be asked how the identity of the parties should be relevant for choosing a panellist. It would be sensible to choose a panellist of the same nationality as the parties, if the parties are both nationals of the same country¹⁰⁷³ or to choose a panellist of a nationality different from each party, where the parties are nationals of different countries¹⁰⁷⁴.¹⁰⁷⁵ Furthermore language capability¹⁰⁷⁶ and availability of the panellist are other important, practical criteria. These factors apart¹⁰⁷⁷, a completely random selection of panellists would be fairer.

¹⁰⁷² Art.8 (1) ADNDRC Rules available from

http://www.adndrc.org/adndrc/bj_supplemental_rules.html [14. September 2007]

¹⁰⁷³ WIPO Case No D2005-0597 *Twist Giyim Sanayi Pazarlama Ve Ticaret A.S v Machka Company*

¹⁰⁷⁴ WIPO Case No D2000-0827 *William Hill Organization Limited v Lisa Jane Statton*

¹⁰⁷⁵ This may be a problem where the panelist needs to speak the language of one of the parties, see the discussion on language 7-3.2.4. Also WIPO Case No D 2004-0643 *Tatra banka v US WARE INC* where the appointment of the panelist was challenged on the basis that he was Czech and one of the parties was Slovak, this challenge rightly failed, as it would have been impossible to find a panelist who speaks the relevant language, as there are few, if any, eg Korean panelists who speak Czech.

¹⁰⁷⁶ UDRP Rule 11 (a): the language of the proceedings should generally be the language of the registration agreement- this provision of course has an impact on panellist selection

¹⁰⁷⁷ In an interview with Christian Wichard at the WIPO Arbitration and Mediation Center on 11. December 2003, he confirmed that these are the criteria they are applying when selecting panelists.

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It is even more significant that the ADNDRC Rules allow the parties some influence over the selection, even where only a single panellist is appointed. This occurs in two ways. Firstly, one of the selection benchmarks is a stipulation in the registration agreement, which gives the registrant some influence.¹⁰⁷⁸ Secondly the Rules provide that, if the parties do not elect a three member panel for the dispute and if the respondent files a defence, the ADNDRC sends the parties a list of five panellists and the panellist ranking highest with both parties is appointed.¹⁰⁷⁹

Michael Geist concludes from his analysis of the relevant data that ‘case-allocation appears to be heavily biased toward ensuring that a majority of cases are steered towards complainant-friendly panellists’.¹⁰⁸⁰ Such a statement is difficult to prove empirically (as opposed to anecdotally¹⁰⁸¹), as there may be a multitude of factors which determine which panellist is appointed to a case. My aim in this thesis is not to prove whether or not panellist allocation under the UDRP is in fact biased or not¹⁰⁸², but merely to point out that non-transparent allocation of arbitrators to a case is problematic.

There are two possible solutions to avoid any *appearance* of bias: one solution would be to allow the parties some control over the choice of arbitrator¹⁰⁸³ or a random selection, after practical criteria such as availability, nationality and

¹⁰⁷⁸ If only by choosing the registrar in the first place

¹⁰⁷⁹ If the case is a default case, then the ADNDRC appoints the single panellist without reference to a list, Art.8 (4) and (5) ADNDRC Rules available from http://www.adndrc.org/adndrc/bj_supplemental_rules.html [14. September 2007]. This footnote refers to the rules of the Beijing Office, but Art.8 is the same in the supplemental rules for the Hong-Kong and the Seoul Offices.

¹⁰⁸⁰ M Geist fn 1041 912, 928. For example, he discovered from his analysis of the data that 53% of all NAF single panel cases (512 of 966) were decided by only six people, *ibid*.

¹⁰⁸¹ One such anecdote is that Professor Milton Mueller has never been appointed single panelist by WIPO, which of course raises the question whether the reason for this is that he has criticized the UDRP as being complainant-biased.

¹⁰⁸² Merely working out how many cases each panelist has heard and in how many cases he or she has ruled in favour of the complainant is probably not sufficient, as this would not take account of other factors. However, it would be interesting to compile these figures, as Michael Geist’s study is now 5 years old and there are many more decided cases. This could be an interesting research project, but is outside the scope of this PhD.

¹⁰⁸³ For example by giving the parties a list of nine arbitrators from which they can each delete four.

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language capability have been satisfied.¹⁰⁸⁴ In the context of the UDRP it may indeed be advisable to have all cases decided by a three-member panel, as this would be likely to improve the quality of the decision-making.¹⁰⁸⁵

(e) Conclusion

Discussing the independence and impartiality of the UDRP a distinction has to be made between the role of the dispute resolution service provider and the panellists. The independence and impartiality of the provider can only be guaranteed if providers are allocated randomly to cases. However the independence and impartiality of the panellists is more important for the outcome and should hence be the focus of this discussion. It is recommended here that there should be an independent third party ruling on any challenge brought by a party alleging a conflict of interest or bias of a panellist. In addition, the composition of the panels should be more balanced with fewer trade mark attorneys and more non-trade mark interests, such as academics, on the lists. Thirdly the parties should have more control over the allocation of the panellists to a case or such allocation should be random. Furthermore the introduction of three member panels for all UDRP cases should be considered in order to improve the quality of decision-making.

3.2.2 Notice and service to the respondent

Tracing a Respondent and effecting actual notice can be difficult to achieve for any Complainant in an international dispute. In order to overcome this issue, the Rules state that the Complainant need not necessarily achieve actual notice, and service is effected by the dispute resolution provider sending the notification and complaint to the contact points listed in the UDRP Rules. These are (i) all contacts in the

¹⁰⁸⁴ M Froomkin fn 1041 691-discussing all options and stating that registrar selection would be best. However the problem there is that registrars themselves have an incentive to be 'registrant-friendly' - hence such a system might create systemic bias poled the reverse way.

¹⁰⁸⁵ And would still be cheaper than court proceedings: the current fees are \$4000 (WIPO for 1-5 domain names), \$\$2600-2900 (NAF for 1-5 domain names), \$\$4,500-6000 (CPR for 1-5 domain names), \$\$ 2,500-3,000 (ADNDRC for 1-5 domain names)

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Registrar's Whois and billing database (by post, fax, email), (ii) an email to 'postmaster@' at the disputed domain name, (iii) an email address on the website to which the domain name resolves and (iv) any contact details provided by the Respondent or the Complainant. The provider must send the Notification and the Complaint to all these various contact points.¹⁰⁸⁶ Since it is in the Respondent's sphere of control to keep his contact details with the Registrar up-to-date, these provisions on notice and service are fair.

3.2.3 Fair hearing: minimum standards and equality

As has been shown in Chapter Six of this thesis the principle of fair hearing means that the parties should have a fair and equal opportunity to argue their case as to law and fact.¹⁰⁸⁷ The principle raises two distinct, but frequently confounded issues, namely minimum standards of quality and rationality, and equality.¹⁰⁸⁸

In commercial arbitration, it is difficult to draw a bottom line of minimum requirements as to procedural fairness, because of the principle of party autonomy, with the consequence that a discussion of 'fair hearing' is usually limited to the issue of equality. However, the UDRP is fundamentally different from commercial arbitration in that it is not a voluntary, but a mandatory procedure and hence, fairness should have a separate meaning in addition to equality.¹⁰⁸⁹ While parties may freely choose to renounce procedural protections and, for example agree to 'throw a dice' instead, they should not be forced to do so by a mandatory dispute

¹⁰⁸⁶ UDRP Rule 2 (a)

¹⁰⁸⁷ 6-4.2

¹⁰⁸⁸ See 2-2.1 and 2-2.2

¹⁰⁸⁹ E Thornburg 'Fast, Cheap and Out of Control: Lessons from the ICANN Dispute Resolution Process' (Spring 2002) 6 *Journal of Small and Emerging Business Law* 191-233, 215; M Scott Donahey 'The Uniform Domain Name Dispute Resolution Process and the Appearance of Partiality- Panelists Impaled on the Horns of a Dilemma' (2002) 19 (1) *Journal of International Arbitration* 33-38, 34-35; see also *Parisi v Netlearning Inc* 139 FSupp2d 745, 751 (District Court ED Va 2001): 'the UDRP's unique contractual arrangements renders the FAA's provisions for judicial review of arbitration awards inapplicable'. This is a similar argument as the one advanced in relation to consumer arbitration above. 7-2: S Ware 'Domain Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in the UDRP' (2002) 6 *Journal of Small and Emerging Business Law* 129-165, 150. He argues that fairness is secondary to consent and since domain name registrants consent to participate in the UDRP when registering a domain name, this provides sufficient legitimacy. see pp. 153-154

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resolution procedure.¹⁰⁹⁰ The reason for this is that the UDRP is not an entirely private procedure, but has public law elements.¹⁰⁹¹

An examination of whether the UDRP provides for a fair hearing therefore raises the two questions whether the UDRP complies with minimum standards of fairness *and* whether the UDRP treats both parties equally. With these two questions in mind the procedural rules are examined.

These two principles are contained in Rule 10 (b) of the UDRP Rules, which provides that ‘in all cases, the Panel shall ensure that the Parties are treated with equality and that each Party is given a fair opportunity to present its case’.

This statement of principle notwithstanding, each party’s opportunity to present its respective case is severely and stringently curtailed in five ways.

(a) No (online) hearings

First, both parties are affected by the rule that there are no hearings absent any exceptional circumstances.¹⁰⁹² The UDRP Rules make clear that this includes any form of tele-, web- or video-conferencing.¹⁰⁹³ In practice this means that any form of hearing will be extremely rare.¹⁰⁹⁴

¹⁰⁹⁰ I am, of course, not asserting here that the decision-making process under the UDRP is the equivalent to throwing a dice.

¹⁰⁹¹ This has been recognized by the US Courts. For example in *Eurotech Inc v Cosmos European Travels AG* 189 FSupp 2d 385, 392 (District Court ED Va 2002) the Court held that ‘arbitration’ under WIPO auspices was not an entirely private matter, as WIPO was a quasi-public organization.

¹⁰⁹² UDRP Rule 13

¹⁰⁹³ *ibid*

¹⁰⁹⁴ WIPO Case No. D2001-0830 *AT&T Corp. v. Randy Thompson*, WIPO Case No. D2001-1369 *Nintendo of America Inc v Enic. Net*, WIPO Case No. D2004-1042 *Jenna Massoli p/k/a Jenna Jameson v Linq Entertainment Inc* and in NAF Case No 95752 *Millennium Broadcasting Corporation v Publication France Monde* the Panels refused to follow a request for an oral hearing by stating that no such hearing is necessary. On inquiry by the author, case administrators at WIPO, CPR and ADNDRC (Hong Kong Office) have stated that they have never personally come across a case, where an in-person hearing had been held (David Roache-Turner, telephone conversation of 5. September 2006, Helena Tavares Erickson, email 15. August 2006 and Dennis Cai, email of 21. August 2006)

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The same applies for the .eu domain name procedure.¹⁰⁹⁵ Interestingly the only dispute resolution provider accredited to date, the Czech Arbitration Court *does* envisage the use of ICT and online hearings. In its Supplemental ADR Rules it provides¹⁰⁹⁶:

“In case the Panel determines, in its sole discretion, that an in-person hearing is necessary, the hearing will be carried out by teleconference, videoconference, or web conference at the CHAT address of the Provider if both Parties agree with the use of such technology.”

In the ordinary procedure, the parties’ submissions are limited to two documents, a Complaint and a Response in the vast majority of cases.¹⁰⁹⁷ The issue here is the credibility and accuracy of these documents, there being no opportunity to probe this information in the examination of witnesses and the UDRP not providing any penalties for making false statements in the Complaint or the Response.¹⁰⁹⁸

(b) Further submissions

Secondly, considering this limitation of the material on which the decision is based, the question arises whether the Panel has the power to probe further if there are any gaps in the evidence. To what extents can Panels ask for further submissions or ask for clarification of specific points?

The UDRP Rules provide indeed that a Panel may request further statements or documents.¹⁰⁹⁹ However, this power is rarely exercised. According to the Legal Index of all WIPO UDRP decisions, Panels have availed themselves of this power

¹⁰⁹⁵ See .eu ADR Rule 9

¹⁰⁹⁶ Rule 7

¹⁰⁹⁷ See the UDRP Rules 3 and 5 and see the discussion on further submissions in the next section

¹⁰⁹⁸ E Thornburg fn 1019 217-218

¹⁰⁹⁹ UDRP Rule 12; likewise the .eu ADR Rule 8: the Panel may request or admit, in its sole discretion, further statements or documents from either of the Parties.

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only in 0.42% of all cases.¹¹⁰⁰ Panels may well find it difficult to find the time to request and consider additional evidence, as the Panel has only 14 days from its appointment to make a decision¹¹⁰¹. However, in exceptional circumstances, the Panel can extend the time for reaching its decisions and in some of the few cases, where the Panels have asked for further evidence, this has been done.¹¹⁰²

(c) Complainant has no right of reply

The third point to make here is that the Complainant has no regular right to a reply. The UDRP Rules do not expressly allow the parties to submit further statements or documents on their own initiative.¹¹⁰³ The Rules merely provide that the Panel decides the admissibility of evidence and this includes any supplemental filings.¹¹⁰⁴

The WIPO and ADNDRC Rules do not add anything to the UDRP Rules on this point. By contrast, the NAF Rules allow either party to file additional written statements or documents¹¹⁰⁵ within five days after the deadline for the Response for the payment of the additional substantial sum of \$400.¹¹⁰⁶ If one party files such an additional statement or document, the other party is entitled to respond to it within five days.¹¹⁰⁷ The CPR Rules allowed parties to submit further statements and documents, but left it to the discretion of each individual panel whether or not it admitted such further statements and documents.¹¹⁰⁸

While the Respondent is able to react to and answer to the allegations made by the Complainant, the Complainant cannot, as a matter of course, respond to the points raised in the Response and therefore has to anticipate and second-guess the

¹¹⁰⁰ 38 cases out of 9008 as of 31. July 2006

¹¹⁰¹ Rule 15 (b)

¹¹⁰² WIPO Case No 2000-0017 *Draw-Tite Inc v Plattsburgh Spring Inc*; WIPO Case No 2003-0043 *Fiji Rugby Union v Webmasters Limited*

¹¹⁰³ Pointed out by the Panel in WIPO Case No D2002-0635 *Classmates Online Inc v John Zuccarini*

¹¹⁰⁴ Rule 10 (d), WIPO Case No D2005-1246 *Admerex Limited v Metvor Inc*

¹¹⁰⁵ but no amendments to the original 'pleadings'

¹¹⁰⁶ Rule 7 (a), (b)

¹¹⁰⁷ Rule 7 (c)

¹¹⁰⁸ CPR Rule 10

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Respondent's case. This disadvantages the Complainant and is contrary to the principle that each party should have an opportunity to respond to the submissions of the other. For this reason, some WIPO panels have allowed Complainants to submit an additional statement to deal with unanticipated defences.¹¹⁰⁹ On the other hand, in most cases the Panels have disallowed a Reply in the interest of expedition.¹¹¹⁰

(d) Narrow word- or page limit

Fourthly, most dispute resolution providers provide a narrow word- or page-limit for the Complaint and the Response.¹¹¹¹ Considering that the Complaint and the Response contain all legal arguments as the basis for the decision, this is restrictive and the word- and page limits have in fact been insisted upon by providers in some cases.¹¹¹² However, in other cases panels generally have taken into account the full submissions, even though they exceeded the word-or page limit.¹¹¹³ Furthermore,

¹¹⁰⁹ The WIPO Legal Index of Decisions indicates that there have been 99 decisions in which a supplemental filing was requested and 40 of these have been granted, see <http://arbiter.wipo.int/cgi-bin/domains/search/legalindex?lang=eng#12300> [13. August 2006]. For example WIPO Case No. D2000-0853 *Investissement Marius Saradar S.A.L. v. John Naffah*, WIPO Case No. D2004-0023 *Custom Bilt Metals v. Conquest Consulting*, WIPO Case No. D2005-0410 *Southwest Airlines Co. v Cattitude a/k/a LJ Gehman*, WIPO Case No. D2005-0508 *Microsoft Corporation v. Source One Management Services Inc.* In WIPO Case No. D2000-1648 *Benzer v. FutureSoft Consulting Inc and Sunil Bhatia* the Panel even went so far in saying that the Complainant had a right to reply.

¹¹¹⁰ In 59 out of 99 decisions, the Panels have refused to consider supplemental filings, see <http://arbiter.wipo.int/cgi-bin/domains/search/legalindex?lang=eng#12300> [13. August 2006]. For example, WIPO Case No. D2000-0166 *Plaza Operating Partners Ltd v Pop Data Technologies Inc*, WIPO Case No. D2000-0938 *Parfums Christian Dior SA v Jadore*, WIPO Case No. D2003-0447 *The EW Scripps Company v Sinologic Industries*, WIPO Case No. D2003-0780 *DK Bellevue Inc d/b/a Digital Kitchen v Sam Landers*

¹¹¹¹ WIPO provides a word limit of 5000 words for each the Complaint and the Response, but no word limit for the Panel Decision, WIPO Rule 10; NAF provides that the Complaint and the Response must not exceed 10 pages, NAF Rules 4(a) and 5(a); CPR Rules provided the same as NAF, see CPR Rules 4 and 5 and ADNDRC Rules provide for an even tighter word limit of only 3000 words for the Complaint and the Response, but no word limit for the panel decision, see Rule 13: the Czech Arbitration Court provides a word limit of 5000 words for the complaint, response and panel decision see .eu ADR Rule 11

¹¹¹² See WIPO Case No D2005-0976 *Giga Pty Limited v. Elena Sadkovaya*, where the Complainant was asked to submit a shorter Complaint complying with the word-limit.

¹¹¹³ see WIPO Case No D2001-0581 *Valero Energy Corporation v American Distribution Systems*; NAF Case No 97031 *Dykema Gossett PLLC v DefaultData.com*; in NAF Case No 122224 *The Trustees of the Trust Number SR-1 v. Turnberry, Scotland Golf and Leisure* the Panel found that the Respondent complied with the ten page limit, even though the Response was 11,000 words (which in Font Size 12 Times Roman would be about 22-25 pages). By contrast in NAF Case No 318079 *Advanced Research & Technology Institute, Inc. v. Eric LeV'in* the Panel refused to consider the Respondents 102-page (sic) Response, which

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the word- or page- limits only apply to the legal argument, not to the evidence adduced in any Annexes.¹¹¹⁴ Hence in practice this limit does not unduly restrict the parties' opportunity to present their respective cases.

(e) Short time limit for filing the Response

Fifthly, the main restriction is the short time limit for the filing of the Response. This is a significant restriction, which affects Respondents only.

The Respondent has 20 days from the day on which the dispute resolution provider has forwarded the Complaint¹¹¹⁵ to file a Response- this time period is less than three weeks.¹¹¹⁶ This is a short time period in itself, if the Respondent has to find a lawyer, prepare his or her case and gather evidence, for example in respect of showing a legitimate use of the domain name¹¹¹⁷. Moreover, the period for preparing the Response is even shorter, if the Respondent cannot be reached by (more or less) instantaneous forms of communication such as fax and email and the communication is delayed in the post, or where the Respondent is an individual who is temporarily absent, for example on holiday. In addition, this extremely short time-limit for serving a Response is determinative for the outcome in a case, as there are usually no other opportunities to submit legal argument or evidence. Therefore this time-limit is likely to hamper the Respondent's defence significantly.

mainly consisted of diatribe irrelevant to the case at issue and the Panel rightly pointed out that it was not its function to 'search through Respondent's venomous attacks on others to find substance somewhere within the many pages of offensive, boorish, racist and anti-Semitic statements'.

¹¹¹⁴ The word-limit only applies to the description of the grounds set out in the Policy, but does not cover evidence, which may be submitted in the Annexes, see WIPO Case No D2001-0558 *AFMA Inc v Globemedia*

¹¹¹⁵ UDRP Rules 5 (a), 4 (c)

¹¹¹⁶ Under the .eu domain name procedure the respondent has 30 *working* days, this is about six weeks, see EC Regulation 874/2004, Art.22 (8). It seems that a lesson has been learnt from the tightness of the deadline under the UDRP.

¹¹¹⁷ such as showing demonstrable preparations to use the domain name in connection with a bona fide offering of goods or services Para 4 (c) (i), or a showing that he or she was known under that name, Para 4 (c) (ii) or demonstrating legitimate non-commercial fair use, Para 4 (c) (iii) UDRP Policy.

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The UDRP Rules provide that in *exceptional circumstances* the dispute resolution provider may extend the deadline for filing the Response.¹¹¹⁸ This wording suggests that an extension is not to be granted as a matter of course and that the dispute resolution provider or the Panel have discretion whether or not to grant such an extension.

The WIPO Rules and the ADNDRC Rules do not elaborate further on the question of under what precise circumstances and how the deadline for filing a Response can be extended.

The NAF Rules stipulate¹¹¹⁹ a procedure which must be complied with. The Respondent must ask the Complainant whether he or she agrees to the extension, must submit the request in writing before the deadline for filing the Response stating the exceptional circumstances for the Request and how much additional time is needed. The maximum extension granted is an additional 20 days and the Respondent must accompany the request with a filing fee of \$100¹¹²⁰.

This raises the question whether and in what circumstances extra-time has in fact been allowed to Respondent and how restrictive is the criterion of 'exceptional circumstances'.¹¹²¹

Looking at some of the relevant WIPO decisions¹¹²², it seems that the WIPO Center obtains the Complainant's comments before deciding whether or not to grant an

¹¹¹⁸ UDRP Rule 5 (d)

¹¹¹⁹ NAF Rule 6 (a) (i)

¹¹²⁰ Presumably this fee is to cover additional administrative costs, but also to deter Respondents.

¹¹²¹ Based on an examination of WIPO and NAF Panel decisions, as these two cover the lion-share of all cases.

¹¹²² No quantitative research has been undertaken, analyzing all the decisions in which the issue of an extension of time for filing the Response or the issue of a late filing of a Response arose- a key word search of all WIPO domain name decisions for 'extension of time' in the same phrase as 'Response' indicates that there are 6767 decisions (as of 31. July 2006). see the search engine provided on the WIPO Center website <http://www.wipo.int/search/en/advanced.html> [31. July 2006]. A random sample of 20 WIPO cases have been examined in closer detail.

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extension of time for filing the Response.¹¹²³ In some cases short extensions of time of 2-12 days have been allowed.¹¹²⁴ However the WIPO Center has been reluctant to grant an extension of 14 days or more in cases, where the Complainant did not consent to such an extension.¹¹²⁵

In reviewing the question of an extension of time Panels emphasize the duty of the panel to ensure that proceedings are conducted in an expeditious manner.¹¹²⁶ Most Panels have interpreted the 'exceptional circumstances' for extension narrowly and likewise, several Panels have held that late responses should be disregarded absent real exceptional circumstances.¹¹²⁷

In sharp contrast, the NAF more readily allows extensions of time, provided a formal request for extension accompanied by the fee of \$100 is filed in a timely

¹¹²³ UDRP Rule 5 (d) also provides that the parties may extend the time by written agreement with the approval of the dispute resolution provider. If the Complainant agrees to the extension of time, the WIPO Center will usually grant such an extension, see for example WIPO Case No. D2002-1129 *Puerto Rico Tourism Co v Virtual Countries Inc*, where the due date for the Response fell on 2. January 2003 and the Complainant agreed that the deadline should be extended by 20 days because of the Christmas holiday period.

¹¹²⁴ WIPO Case No. D2004-1030 *Allee Willis v. NetHollywood*: the Respondent asked for an extension of 60 days, the WIPO Center permitted 7 days; WIPO Case No. D2000-1648 *Benzer v. FutureSoft Consulting Inc and Sunil Bhatia*: the Panel allowed 12 days because one of the Respondents was out of his country of residence.

¹¹²⁵ WIPO Case No. D2003-0091 *International Health Insurance Danmark Forsikringsaktieselskab v Cortes jr. Fernando*; WIPO Case No. D2004-1030 *Allee Willis v. NetHollywood*; WIPO Case No. D2002-0241 *The Leading Hotels of the World Ltd. v. Online Travel Group*

¹¹²⁶ UDRP Rule 10 (c); WIPO Case No. D2004-1030 *Allee Willis v. NetHollywood*; WIPO Case No D2004-0614 *Museum of Science v Jason Date*: 'otherwise parties will feel free to disregard deadlines and respondents will regularly submit late responses'

¹¹²⁷ In WIPO Case No. D2003-0033 *1099Pro Inc v Convey Compliance Systems Inc* the majority of the Panel refused to accept a Response filed 10 days late, even though the Respondent was not legally represented or advised. The reason that the period concerned was the 'busiest time of our season' was not regarded as sufficient cause for an extension. In WIPO Case D2005-1304 *Mobile Communication Service Inc v WebReg* the Panel refused to accept a Response 8 days late. It considered that the Respondent's clerical error in entering the wrong date in its calendar was not a valid ground to accept a late submission, nor that the Respondent's legal representative was busy on another case. In WIPO Case D2005-0994 *Fashiontv.com GmbH v Chris Olic* a Response filed two days late was disregarded, the reason being given was that the respondents had difficulties in obtaining evidence. Again this was not regarded as exceptional circumstances. Finally the mislaying of files in the respondent's archive also was not considered a sufficient ground for an extension of time in WIPO Case DRO2005-0005 *OMI AG v SC Mondokommerz SRL*

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manner and the procedure set out in Rule 6 (a) (i) has been complied with.¹¹²⁸ The requirement to pay a fee has been criticised in the literature.¹¹²⁹ However, the fact that NAF has introduced a procedure to deal with extensions and readily grants such extensions is usually overlooked by these authors, who claim that NAF is harsh on this issue.¹¹³⁰

Most NAF panel decisions do not state whether or not the Complainant has agreed to the extension, but the Respondent must have conferred with the Complainant as part of the procedure. In the few cases where the Panel did not allow an extension of time, the Respondent had not complied with the procedure for the Request under NAF Rule 6 (a) (i).¹¹³¹ Where the Response was simply late, most panels have refused to take it into account¹¹³², whereas a few other panels have still considered it¹¹³³.

The conclusion from the foregoing is that, although there is a possibility to extend the extremely short time-limit for serving the response in exceptional circumstances, this does not alleviate the problem that this time-limit is too short, as

¹¹²⁸ A search for the phrase 'extension of time' in the search engine for the NAF decisions at <http://domains.adrforum.com/decision.aspx> [26. July 2006]: flushed out 55 records. Out of these, the NAF did not accept a request for an extension of time in two cases and in another four cases it did not allow a late Response. Many decisions simply state that the Respondent applied for an extension of time in accordance with the procedure and that it was granted, without detailing the exceptional circumstances relied on. In some cases the reasons are stated, for example, NAF has allowed an extension of time of 15 days, where the respondent had problems in finding an available lawyer: NAF Case No. 94243 *Youtv Inc v Erkan Alemdar* or NAF Case No. 692150 *Charles Letts & Co Ltd v Citipublications*, where the Respondent was given an additional 20 days with the agreement of the Complainant, as he was out of his country of residence.

¹¹²⁹ E Thornburg fn 1019 215

¹¹³⁰ M Froomkin fn 1041 703

¹¹³¹ NAF Case No 545232 *Tata Sons Ltd v US Citizen aka Sojan Pulickal*; NAF Case No 96694 *Victoria's Secret et al v. Sherry Hardin*

¹¹³² NAF Case No 114758 *Foley & Lardner v Brian G Wick*: the Panelist refused to accept the Response, even though the electronic copy was filed on time, but the hardcopy form and Annexes were 4 days late: NAF Case No 545232 *Tata Sons Ltd v US Citizen aka Sojan Pulickal* where the Response was a couple of days late: see also NAF Case No 95823 *Wombat Enterprises Inc d/b/a Domain-It! v Advanced Network Technologies* and NAF Case No 94941 *Gorstew Limited v Shop A-Z.com Inc*

¹¹³³ For example in NAF Case No 94346 *Tall Oaks Publishing Inc v National Trade Publications Inc* the Panel took into consideration a Response which was 11 days overdue, without having been given any reason for the late filing: see also NAF Case No. 112469 *Gaiam Inc v Nielsen*, where the Panel accepted a Response 22 days after the deadline, as the Respondent asserted that he had not received the Complaint until after the deadline had expired.

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an extension will only be granted in really exceptional circumstances (WIPO) or is restricted to an additional 20 days (NAF). Furthermore the panel decisions on whether a late response is permissible are inconsistent.

The mere fact that the keyword search used to find WIPO cases¹¹³⁴, in which there was an issue about the extension of time for filing a Response, flushed up 6767 cases (out of a total of 9008¹¹³⁵) shows that the tightness of the 20 day deadline causes problems for many respondents preparing their case. *Milton Mueller* explains the high default rate partly by the fact that the UDRP procedure moves so fast that ordinary domain name registrants may be prevented from defending themselves.¹¹³⁶

It can also be argued that there is an imbalance between the Complainant and the Respondent: the Complainant has no time-limit for preparing the Complaint, which contrasts with the extremely tight deadline for Respondents.¹¹³⁷ Admittedly, this is a prejudice inherent in all forms of adjudication. The party commencing the proceedings is always at a tactical advantage, as they may choose the right moment to do so. Albeit, that under the UDRP the trade mark owner always starts the proceedings, and the registrant is always in the position of respondent, as the UDRP does not allow the registrant to ask for a declaration that it had legitimate rights and that the registration was not abusive. In that sense it could be argued that the UDRP is severely discriminating against the domain name registrant, who is handicapped in the preparation of a defence.

¹¹³⁴ A similar search was not possible for the NAF cases, as the search engine on the NAF decision site does not allow the use of the Boolean connector 'within', which makes it impossible to search for a phrase, not knowing the exact words which may be used.

¹¹³⁵ As of 31. July 2006

¹¹³⁶ M Mueller fn 1034 12

¹¹³⁷ Fn 1019 216

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(f) Conclusion

This section has discussed the procedural restrictions which the UDRP and the supplemental rules impose on the parties in proving their case. The question which has to be answered is whether these strictures make the procedure unfair. For this, it is important to decide which yardstick the procedure should be measured against. As I have said at the outset of this section, the procedural standards of traditional, commercial arbitration should not be applied, the UDRP being a mandatory procedure. If the purpose of a procedure is to establish the facts and to apply the law, sufficient legal argument and evidence must be allowed to make the procedure rational and fair.¹¹³⁸ Decision outcomes, based on partial argument and facts, become irrational. On the other hand, too much procedure will lead to delay and expense, making the procedure inaccessible and slow. Hence the amount of procedural protections has to be proportionate to the issues at stake.

A domain name can be extremely valuable to the parties and the application of the UDRP involves many fact-intensive issues, on which evidence must be led.¹¹³⁹ Such fact-intensive issues include, for example, proving the existence of an unregistered trade mark, the respondent's legitimate interest in the domain name or the question of bad faith. As discussed above the parties' opportunity to present their case has been severely curtailed. Many authors have stated that the UDRP is not suitable to decide such complex and important issues. This cannot be formulated more concisely than in *Froomkin's* words¹¹⁴⁰:

'Without cross-examination, expert testimony and a greater inquiry into the facts than the current system allows, arbitrators have little choice but to shoot from the hip, and this increases the odds that they will miss.'

¹¹³⁸ See Chapter 2 for a discussion of the relationship between rationality and fairness

¹¹³⁹ E Thornburg fn 1019 198-199

¹¹⁴⁰ M Froomkin fn 1041 698

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The main procedural defects identified are the rule that there are no (online) hearings, there is no right to a reply, the restrictions on further submissions of material and most significantly the short-time limit for filing the Response. These defects mean that the UDRP has too stringently curtailed legal argument and factual evidence and this restricts the amount of material the panels can consider, leading to irrational and inconsistent decisions. In addition there is also a violation of the principle of equality. The procedure does not treat the parties equally, as complainants have the unequal burden of anticipating the respondents' case and respondents are crippled by the short timeframe set for the response. It is therefore submitted that the procedure is unfair.

A longer time period for filing the Response, such as eight rather than three weeks would not prejudice the Complainant disproportionately. Likewise, the use of ICT to allow for distance hearings (by web-conference, teleconferencing or video-conferencing) may make the procedure fairer, by allowing more argument and evidence to be admitted, by allowing further questions be put to the parties to clarify issues and some limited cross-examination, without adding too much in terms of cost and delay. The rules governing further submissions should be relaxed and a right of reply introduced. These procedural issues will be taken into account for the due process standards established in the Model in Chapter Eight.¹¹⁴¹

3.2.4 Language

In many UDRP proceedings the Complainant trade mark holder and the Respondent domain name registrant will be located in different countries and will be speaking different languages. Hence it is not surprising that language issues have arisen in many proceedings. The language issue is a tricky one. Proceedings conducted in a language foreign to one party may well deprive that party from having meaningful

¹¹⁴¹ 8-3

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access to the proceedings or a fair and equal opportunity to present his or her case. On the other hand translation may add significant cost.¹¹⁴²

In this context it should be pointed out that an official version of the UDRP only exists in English.

Rule 11(a) of the UDRP Rules states that the proceedings shall be held in the language of the Registration Agreement.¹¹⁴³ The Panel may direct that documents be translated into that language.¹¹⁴⁴ The purpose of this rule is to protect the Respondent, who, of course, chooses the Registrar and hence has some influence on the language of the registration agreement and, indirectly the proceedings.

However Rule 11 (a) also states that the Panel has discretion to direct that the proceedings may be conducted in another language. Clearly a rigid rule that proceedings should always be conducted in the language of the Registration Agreement does not make sense, for example where both parties are proficient and comfortable to communicate in the same language and the Registration Agreement is in a language different from that or where the Respondent¹¹⁴⁵, despite being notified in the language of the Registration Agreement, does not file a Response¹¹⁴⁶.

WIPO panels have made clear that the notification of the Complaint to the Respondent should always be in the language of the Registration Agreement to give

¹¹⁴² Discussed in WIPO Case No D2000-1759 *Beiersdorf AG v Good Deal Communications*

¹¹⁴³ Same applies to the .eu ADR proceedings, see EC Regulation 874/2004. Art.22 (4)-most panel proceedings are conducted in English, see <http://www.adr.eu/adr/decisions/index.php> [14. September 2007]

¹¹⁴⁴ Rule 11 (b)

¹¹⁴⁵ See for example WIPO Case No D2003-0679 *Deutsche Messe AG v Kim Hyungho*; WIPO Case No D2003-0989 *Dassault Aviation v Mr Minwoo Park* in both cases the Panel determined that the Korean respondent was able to communicate in English without difficulty

¹¹⁴⁶ See for example WIPO Case No D2003-0774 *Amazon.com Inc v Kim Yoon-Jo* or WIPO Case No D2005-0407 *Auchan v Oushang Chaoshi*

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the Respondent an opportunity to appreciate the true nature of the proceedings and a chance to object to the proceedings being held in English.¹¹⁴⁷

One issue may arise from the fact that for some domain name registrants there may be no registration agreement available in their vernacular. Presumably, most Registrars offer their registration agreements in their national language. For example for the .com generic top-level domain, most Registrars are based in the US/Canada, Western Europe, some in Asian countries (Korea, China, Japan, India, Singapore, Malaysia) and Australia & New Zealand.¹¹⁴⁸ A domain name registrant in, for example Poland or Thailand would have to sign a registration agreement in a foreign language¹¹⁴⁹ and thus conduct the proceedings in a foreign language and bear the cost of translating all documents.

A second issue may arise from the way Panels have exercised their discretion under Rule 11 (a) of the UDRP. In particular, here the question arises whether panels are able to assess the Respondent's language proficiency merely on the basis of a one-off communication such as a letter written to the dispute resolution provider or to the Complainant. In many cases panels have allowed proceedings in English on a vague assessment that the Respondent would be proficient in that language.¹¹⁵⁰

For example, in one case¹¹⁵¹ the domain name was registered with Neptia, a Korean registrar and the Respondent requested in a letter, written in English, that the proceedings be held in Korean, pointing out that the Registration Agreement was in Korean and that he did not speak English well. The Panel simply took this letter

¹¹⁴⁷ Expressly stated in the WIPO Rules, Rule 4 (a), also WIPO Case No D2000-1759 *Beiersdorf AG v Good Deal Communications*; WIPO Case No D2005-0407 *Auchan v Oushang Chaoshi*

¹¹⁴⁸ There are also registrars in Russia, Turkey, Jordan, Kuwait and Israel. The only Eastern European state was Latvia and the only South-American state was Brazil. See the list on the Verisign website at http://www.verisign.com/information-services/naming-services/com-net-registry/page_002166.html as of 5. August 2006

¹¹⁴⁹ Probably English

¹¹⁵⁰ Eg WIPO Case No D2000-1759 *Beiersdorf AG v Good Deal Communications*; WIPO Case No D2003-0679 *Deutsche Messe AG v Kim Hyungho*; WIPO Case No D2003-0989 *Dassault Aviation v Mr Minwoo Park*; WIPO Case No D2005-0407 *Auchan v Oushang Chaoshi*, NFA Case No 110843 *BEA Systems v Park Sung Jo*

¹¹⁵¹ NFA Case No 110843 *BEA Systems v Park Sung Jo*

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itself as proof that the registrant is able to communicate in English and for this reason declined to conduct the proceedings in Korean and reached a default decision, when the Complainant did not file a Response.

In conclusion it should be pointed out that to comply with Rules 10 (b) and 11 (a) of the UDRP at least the notification should be translated into the language of the registration agreement, Panels should be slow to infer that Respondents are proficient in English and Respondents should be allowed to file documents in the language of the registration agreement.

3.2.5 Use of online technology

As has been discussed in Chapter Five, the use of online technology is important as it renders dispute resolution more efficient and hence fairer.¹¹⁵²

The use of online technology in the UDRP procedure varies slightly between the different dispute resolution service providers. WIPO, NAF and ADNDRC allow the parties to submit the complaint and the response as an attachment to an email and to communicate by email. Alternatively, WIPO, NAF, ADNDRC and the Czech Court of Arbitration have set up an online case filing system, which enables both parties to file their submissions by uploading documents through the internet. In addition, the WIPO, NAF and ADNDRC have made available model form documents in word or electronic format to facilitate filing.¹¹⁵³

As has been discussed above, the UDRP does not envisage the use of innovative communications for online hearings.¹¹⁵⁴ The imaginative use of technology for real-

¹¹⁵² 5-5

¹¹⁵³ WIPO Rule 3 (a) (ii) and (iii), see <http://www.wipo.int/amc/en/domains/filing/udrp/index.html>. NAF website at <http://domains.adrforum.com/main.aspx?itemID=276&hideBar=False&navID=202&news=26> and ADNDRC Rule 3 (1) and website http://www.adndrc.org/adndrc/bj_download.html [14. September 2007]

¹¹⁵⁴ Contrast this with the provisions in the Czech Court of Arbitration's Supplemental .eu ADR Rules, discussed above

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time interaction, such as video and web-conferencing and chat, should be explored¹¹⁵⁵ to improve communication and the decision process.

3.2.6 Lack of appeal and inconsistency of decisions

The significance of the right to appeal for due process has been explored in Chapter Six¹¹⁵⁶. One defect of the UDRP procedure in this respect is that it does not provide for an appeal process whatsoever. This is the case for both challenges to procedural matters and appeal of substantive matters.¹¹⁵⁷

(a) Challenge on procedural matters

Important in this discussion of due process is whether a party can challenge aspects of the *procedure* either before or after a decision has been reached. For example, one party may assert a serious irregularity of procedure, preventing it from having an opportunity to present its case, for example, where the Panel disregards a Response or a Panel may on occasion breach a procedural rule, for example by inadvertently allowing *ex parte* communications, or a party may challenge the appointment of a panellist on the basis of a conflict of interests. In these scenarios the question arises whether and how the aggrieved party can challenge the procedure, or, if a decision has already been reached, the decision.

While the UDRP Rules contain various procedural protections for the parties, including a stipulation about fair hearing¹¹⁵⁸ and independence and impartiality of

¹¹⁵⁵ M Froomkin fn 1041 705; E Thornburg fn 1019 219

¹¹⁵⁶ 6-7

¹¹⁵⁷ The same is true for the .eu procedure, see .eu ADR Rule 12 (a); unlike the procedure established by Nominet for .uk country code domain names, which provides for an appeal to a panel of three experts, see <http://www.nominet.org.uk/disputes/drs/appeals/> [14. September 2007]

¹¹⁵⁸ Rule 10 (b)

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the panels¹¹⁵⁹, there is no procedure for the parties to challenge a panel decision, if these rules have been breached¹¹⁶⁰ and this puts their effectiveness into doubt¹¹⁶¹.

Since there is no appeal body or procedure, the only institutions apt to hear such a challenge is the panel itself or the dispute resolution provider.¹¹⁶² There is no 'higher' appeal body or third party considering procedural challenges, unlike traditional arbitration where the ordinary courts can hear procedural challenges under their supervisory and/or enforcement jurisdiction.¹¹⁶³

The procedural rules of the providers are mostly silent on this point. Only the CPR Rules explicitly empowered the panel to decide any procedural or jurisdictional challenges and the CPR Rules also stated that challenges to the independence, impartiality or integrity of the panel itself were decided by an officer of the CPR.¹¹⁶⁴ The NAF Rules state expressly that a party can challenge the appointment of a panellist on the grounds of lack of independence or impartiality before a decision has been reached by filing a request with the NAF.¹¹⁶⁵

Procedural challenges are usually considered by the panels when reaching a decision.¹¹⁶⁶ However, no procedural challenges are possible after the panel has reached its decision.

Panel decisions have found that in very exceptional cases, a panel may allow a case to be reheard on the application of the complainant, where in the first proceedings

¹¹⁵⁹ Rule 7

¹¹⁶⁰ In WIPO Case No D2001-0505 *Britannia Building Society v. Britannia Fraud Prevention* the Panel was concerned about this issue: 'Neither the Policy nor the Rules explicitly create a procedure by which a party can raise concerns about the suitability of a designated Panelist. However it is critical that a mechanism be provided to ensure compliance with Rule 7 and Rule 10 (b)'

¹¹⁶¹ M Froomkin fn 1041 689: 'Current procedures rely on arbitrators to disclose potential conflicts, but this is clearly insufficient, since the truly biased person will tend to downplay the extent of conflicts'.

¹¹⁶² WIPO Case No D2001-0505 *Britannia Building Society v. Britannia Fraud Prevention*

¹¹⁶³ See Chapter 6-7, as to the role of the courts see below 7-3.2.7

¹¹⁶⁴ CPR Rule 9

¹¹⁶⁵ NAF Rules 10 (c), (d), (e)

¹¹⁶⁶ WIPO Case No D2004-0643 *Tatra Banka v US WARE INC*; WIPO Case No D2004-0535 *United Services Automobile Association v Ang Wa Assoc*; WIPO Case No. D2000-0629 *Consorzio del Prosciutto di Parma v Domain Name Clearing Company*; NAF Case No 139595 *CV Ranch v Default Data.com*

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the complainant was deprived of justice because of a serious misconduct on the part of a panellist, witness or lawyer, because of perjured evidence, or more generally, where there has been another serious breach of due process. However, these decisions have held that such a refiling of the complaint is only permissible if the breach is so serious that it amounts to a miscarriage of justice. This establishes a high burden of proof.¹¹⁶⁷

But in any case, these rulings on rehearing the same case again only benefit the *complainant*, not the respondent.¹¹⁶⁸ This is unfair, as it infringes the principle of equality between the parties giving the complainant a second bite of the apple to rectify infringements of due process, but not the respondent.¹¹⁶⁹

For these reasons, it is argued here that the UDRP rules should provide for a procedure to allow either party to challenge a decision if there has been a breach of the requirement for a fair hearing or the requirement of an independent and impartial panel. This could be done by way of a rehearing by a different panel, by appeal to a 'superior' body¹¹⁷⁰ or appeal to a court of law. Successful challenges are probably rare¹¹⁷¹, not leading to significant costs, or delay.

(b) Substantive appeals

As to substantive appeals, the UDRP does not provide for an appeal in matters of substance. There is no procedure to review the decision on the factual findings and

¹¹⁶⁷ WIPO Case No D2000-0703 *Grove Broadcasting Co Ltd v Telesystems Communications Limited*; WIPO Case No D2000-1490 *Creo Products Inc v Website In Development*; WIPO Case No DWS2002-0001 *Philips v Relson Ltd*; NAF Case 721968 *AOL LLC v Robert Farris*; While stating the general principle all these cases concerned a refiling of the Complaint based on new evidence, rather than serious misconduct or breach of natural justice.

¹¹⁶⁸ A respondent cannot counterclaim or seek a free-standing declaration of reverse domain name hijacking, see by way of illustration the NAF Case No 098010 *Glimcher University Mall v GNO*

¹¹⁶⁹ M Froomkin fn 1041 699

¹¹⁷⁰ The establishment of an appeal body is discussed below.

¹¹⁷¹ On inquiry by the author, CPR stated in an email of 15. August 2006 by Helena Tavares Erickson (Senior Vice-President Committees, Research & Education) that to her knowledge such a procedural challenge had never arisen in the few CPR cases filed. Likewise, Dennis Cai, Case Administrator of the ADNDRC Hong Kong office has also replied that he is not aware of any procedural challenges to date (email of 21. August 2006) on file with author.

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no appeal on points of law. As has been discussed in Chapter Six¹¹⁷², the lack of an appeal procedure for a substantive review lowers standards for individual justice, as the losing party has no opportunity to correct mistakes in the application of the law, but also leads to a lower quality of justice overall, as there are no authoritative rulings on points of law, streamlining reams of inconsistent decisions.

The lack of appeal and the discrepancies of UDRP decisions has been heavily criticised in the literature.¹¹⁷³ The UDRP has established a novel substantive law combating cybersquatting on a global basis and the panels are staffed by lawyers from many different legal cultures and traditions. Furthermore, panellists are free to take into account any law that they deem applicable.¹¹⁷⁴ Given this diverse and cosmopolitan nature of panels and the murky choice of law clause¹¹⁷⁵, it is perhaps not surprising that there are many inconsistent interpretations of the UDRP.¹¹⁷⁶

An appeal process would help to generate coherence and a greater degree of legal certainty.¹¹⁷⁷ In order to achieve this, appeal ruling should have the force of legal precedent. Appeals could be heard by special, more senior appeal panels, composed of three or five special appeal panellists. These appeal panellists should be senior lawyers with long-standing experience in hearing UDRP cases.

On the other hand, obviously, an appeal procedure is apt to lead to delay and an increase of costs.¹¹⁷⁸ This could be remedied by appeals being subject to a leave requirement and leave should only be given where the outcome of a case depends on the interpretation of the UDRP and the case raises new issues important for the

¹¹⁷² 6-7

¹¹⁷³ E Thornburg fn 1019 224; M Scott Donahey 'A Proposal for an Appellate Panel for the Uniform Domain Name Dispute Resolution Policy' (2001) 18 (1) *Journal of International Arbitration* 131-134, 131-132

¹¹⁷⁴ UDRP Rule 15 (a)

¹¹⁷⁵ E Thornburg fn 1019 215: this has 'resulted in eclectic and unprincipled choice of law decisions, creating uncertainty about applicable law'; also L Helfer fn 1024 495

¹¹⁷⁶ Panels tend to refer to other panel decisions, but there is a huge body of decisions and a systematic search through all decisions is next to impossible

¹¹⁷⁷ L Helfer fn 1024 495

¹¹⁷⁸ For this reason, *Milton Mueller* argues against an appeal system for the UDRP, see M Mueller fn 1034 12

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development of a consistent UDRP law.¹¹⁷⁹ The appeal process should also contain strict-time limits.¹¹⁸⁰ The leave requirement and the time-limits would ensure that the appeal process does not introduce excessive costs and delay.

One way to spread the costs of appeals, would be to finance the appeal by a combination of a special fee paid by the party lodging the appeal with a small additional fee imposed either on each domain name registration or an appeal fee added to each UDRP case.¹¹⁸¹

(c) Conclusion as to appeals

The UDRP should provide for an appeal system, allowing an aggrieved party to challenge a procedural mischief or a decision based upon a procedural mishap and appeals on points of law. Such appeals could be heard by special appeal panels composed of three to five senior panellists (such panels being established across all service providers).

The lack of an appeal system notwithstanding, the losing party can, however, go to court.¹¹⁸² As *Circuit Judge Sotomayor* has stated: ‘Unlike traditional arbitration proceedings, UDRP proceedings are structured specifically to permit the domain-name registrant two bites at the apple’¹¹⁸³ From a superficial point of view it may seem that the due process concerns raised by the UDRP being a ‘rough and ready’ procedure combined with the lack of appeal are remedied by the fact that parties are not prevented from starting court proceedings. That this is not the case, will be shown in the next section.

¹¹⁷⁹ M Scott Donahey fn 1173 133

¹¹⁸⁰ M Scott Donahey fn 1173 133

¹¹⁸¹ M Scott Donahey fn 1173 133

¹¹⁸² Paragraph 4 (k) UDRP Policy

¹¹⁸³ *Storey v Cello Holdings LLC* 347 3Fd 370, 381 (2nd Cir NY 2003)

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3.2.7 Court proceedings as parallel proceedings

If the complainant loses, the status quo is maintained, unless and until the complainant can provide the registrar with a court decision, ordering the transfer or cancellation of the domain name. On the other hand, if the respondent loses the UDRP case and the panel has ordered the cancellation or transfer of the domain name, the registrar will implement that decision, unless the respondent starts court proceedings. The respondent has 10 business days from the date when the registrar was notified of the decision to provide the registrar with official documentation¹¹⁸⁴ that the respondent has started court proceedings to obtain a declaration that he or she is not infringing the complainant's rights and/or has a right to use the domain name. If the respondent starts court proceedings in a court and furnishes the required evidence within the time limit, the registrar will not transfer or cancel the domain name, unless the respondent's court case is settled, withdrawn or decided against the respondent.¹¹⁸⁵

(a) Rectifying mistakes under the UDRP

However, it is clear that the relationship between a panel decision and litigation before the courts is that of parallel proceedings. The court does *not* apply the UDRP as the substantive law to the dispute. Such court proceedings would be heard based on the applicable national law such as trade mark law, passing-off¹¹⁸⁶ and unfair competition law¹¹⁸⁷, anti-cybersquatting law¹¹⁸⁸ or tort¹¹⁸⁹. The US Anti

¹¹⁸⁴ An email by the registrant that he has started court proceedings is not sufficient: *America Online Latino v AOL Inc* 250 FSupp2d 351, 358 (District Court SD New York 2003)

¹¹⁸⁵ Paragraph 4 (k) UDRP Policy

¹¹⁸⁶ English case of *BT v One in a Million* [1999] 1 WLR 903 (CA)

¹¹⁸⁷ *Eurotech Inc v Cosmos European Travels AG* 213 FSupp2d 612, 614 where the registrant sued the trade mark owner after a WIPO panel had held that the domain name be transferred. The trade mark owner counterclaimed and successfully moved for summary judgment for trade mark infringement and unfair competition 15 USC §§ 1114, 1125(a) and under the anti-cybersquatting provisions of the ACPA in 15 USC § 1125 (d) and the Court ordered the transfer of the domain name.

¹¹⁸⁸ Such as the US Anticybersquatting Consumer Protection Act 1999, incorporated in the Lanham Act 15 USC § 1114 (2) (D) (v). In *Jay D Sallen v Corinthians Licenciamentos* 273 3Fd 14, 26 (1st Circuit 2001) where the Court found that this section of the ACPA can be used as a sword (*ie* cause of action): 'S.1114

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Cybersquatting Consumer Protection Act 1999 is unique in creating a specific anti-cybersquatting law.¹¹⁹⁰ In the UK, a registrant who was losing a domain name as a result of an UDRP ruling may attempt to make an application under section 21 of the Trade Mark Act 1994, providing a remedy for groundless threats of infringement proceedings.¹¹⁹¹ Albeit that a complainant under the UDRP may not be asserting trade mark infringement (as the UDRP claim is *sui generis*) so that this section is inapplicable.

This also means that the ordinary courts do not entertain a challenge against a UDRP decision based on procedural grounds.¹¹⁹² Nor does the court directly review the facts alleged before the UDRP panel. Although some of the factual issues may cover the same ground (such as the validity of the complainant's trade mark or the respondent's use of the disputed domain name), the court has a greater array of tools available for its fact-finding process (such as in-person hearings and examination of witnesses) and therefore its factual findings may well differ from that of the panel.¹¹⁹³ Court proceedings therefore do not constitute a review or appeal of the UDRP decision.¹¹⁹⁴

(2) (D) (v) provides a registrant who has lost a domain name under the UDRP with a cause of action for an injunction returning the domain name if the registrant can show that she is in compliance with ACPA.'

¹¹⁸⁹ *Eurotech Inc v Cosmos European Travels AG* 189 FSupp 2d 385, 389 (District Court ED Va 2002) The Court found that a complainant is immunized from tort claims based on the initiation and maintaining of WIPO proceedings under the UDRP.

¹¹⁹⁰ L Helfer fn 1024 497-notes that the ACPA has acted as a pull for anti-cybersquatting cases into the US courts- see also 7-3.2.7

¹¹⁹¹ See the case of *Global Projects Management Ltd v Citigroup* [2005] EWHC 2663 (Ch), or by analogy *Quads4Kids v Campbell* [2006] AllER (D) 162 (Oct) where the court found that the dispute resolution procedure on eBay used by the owner of a design right may amount to a threat of infringement proceedings

¹¹⁹² For example in *Eurotech Inc v Cosmos European Travels AG* 213 FSupp2d 612, 617 the Court pointed out that, although the WIPO 'arbitrator' allowed the defendant (Cosmos. the complainant) to amend the complaint, he declined the claimant (the respondent in the WIPO proceedings) to respond to the amended complaint (see WIPO Case No D2001-0941 *Cosmos European Travels AG v Eurotech Data Systems Hellos Ltd*). The District Court merely noted this without any discussion of due process, as it was reviewing the case *de novo*.

¹¹⁹³ Mr Justice Laddie noted in *Computer Futures Recruitment Consultants Ltd v Stylemode Data Ltd* 2000 WL 33281329 (ChD) that 'the type of enquiry engaged in by ICANN may well not meet the rather more stringent requirements of applying in a court of law'.

¹¹⁹⁴ Expressly stated in *Dluhos v. Strasberg*, 321 F.3d 365, 373-74 (3rd Circuit 2003)

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By the same token it is also clear that the UDRP does not constitute arbitration in the sense of the FAA, so the courts are not reviewing awards under Paragraph 10 as to arbitrator misconduct, serious procedural flaws or manifest disregard of the law.¹¹⁹⁵

Although there does not seem to exist a case on this point, the English courts would probably also not be restricted by the limitations of ss. 67-69 of the Arbitration Act 1996¹¹⁹⁶, but decide a case *de novo*. A long series of (mainly US) court decisions have made clear that the courts owe no deference to UDRP decisions and that the courts examine the dispute *de novo* under the (probably different) standards of the applicable national law.¹¹⁹⁷

Even though a court case is not heard under the UDRP, it will cancel out or supersede any panel decision.¹¹⁹⁸ If the panel decides that the domain name should be transferred, but a court subsequently finds that the respondent does not infringe the complainant's rights under the applicable national law, the registrar will not implement the original panel decision. Likewise, in the reverse, if the complainant does not secure the domain name in the UDRP panel proceedings, but subsequently succeeds in, for example a trade mark suit before a national court, the registrar will cancel or transfer the domain name to comply with the court decision, notwithstanding the UDRP decision to the contrary.

¹¹⁹⁵ *Parisi v Netlearning Inc* 139 FSupp2d 745, 752 (District Court ED Va 2001), nor would an English court apply the provisions in the Arbitration Act 1996 for the same reasons.

¹¹⁹⁶ Grounds for challenging and award and appeals on points of law, see 6-7

¹¹⁹⁷ See *Marcel Stenzel v Gary L Pfifer* WL 2104438 (District Court WD Wash 2006). Order of 26. July 2006; *Convey Compliance Systems Inc v 1099 Pro Inc* 443 F3d 327, 333 (4th Circuit 2006); *Storey v Cello Holdings LLC* 347 3Fd 370, 373-4, 382 (2nd Cir NY 2003); *Barcelona.com, Incorporated v. Excelentísimo Ayuntamiento De Barcelona* 330 F3d 617, 626 (4th Circuit 2003); *Retail Sevices Inc v Freebies Publishing* 247 FSupp2d 822, 827-828 (District Court ED Va 2003); *Eurotech Inc v Cosmos European Travels Aktiengesellschaft* 213 F.Supp.2d 612, 618 (District Court ED Va 2002); *Parisi v Netlearning Inc* 139 F Supp 2d 745, 752 (District Court ED Va 2001); see also implicitly, Swiss BGE 4C.376/2004/lma (Highest Swiss Civil Court), Judgement of 21. January 2005 concerning the maggi.com domain name, reversing the WIPO Case No D 2001-0916 *Nestlé v Pro Fiducia Treuhand* by applying Swiss law on name rights and unfair competition.

¹¹⁹⁸ *Jay D Sallen v Corinthians Licenciamentos* 273 3Fd 14, 26-27 (1st Circuit 2001); *Storey v Cello Holdings LLC* 347 3Fd 370, 382 (2nd Cir NY 2003); *Marcel Stenzel v Gary L Pfifer* WL 2104438 (District Court WD Wash 2006). order of 26. July 2006. This was recommended in the first WIPO domain name process, see the Final Report WIPO Internet Domain Name Process of 30. April 1999

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One could therefore argue that the UDRP allows ‘wrong’ decisions to be rectified by allowing the parties to go to court. However the recourse to courts will frequently not be available to the losing party, because of the costs and since the UDRP has a different scope from national law.¹¹⁹⁹ This is particularly acute where the parties are based in different countries, as will frequently be the case.

(b) Jurisdiction and conflict of law issues

In addition, recourse to the courts involves perplexing jurisdiction and conflicts of law issues, which the UDRP was meant to avoid in the first place. For this reason also it cannot be said that the recourse to the courts can replace the availability of an appeal.

Redress before courts raises the puzzling question of jurisdiction. Which court should the respondent commence proceedings in order to prevent the transfer of a domain name? The UDRP makes clear that the courts at the principal office of the registrar or the respondent’s address as shown in the *Whois* register should have jurisdiction (so-called ‘mutual jurisdiction’).¹²⁰⁰ Essentially, the complainant agrees to submit to this mutual jurisdiction in his or her complaint.¹²⁰¹ The purpose of these rules on jurisdiction in the UDRP is to protect the respondent, if he or she loses under the UDRP, as it is likely that the courts of the mutual jurisdiction are closer to ‘home’ for the respondent.

As has been mentioned above, the UDRP has shifted the burden of litigation from the trade mark holder to the domain name registrant. To counterbalance this, as a political compromise, the UDRP, *prima facie* has shifted the burden of defending a case in a foreign jurisdiction to the complainant.¹²⁰² While the UDRP provides that

¹¹⁹⁹ Only a very small percentage of UDRP cases end up in court

¹²⁰⁰ Paragraph 4 (k) UDRP Policy, UDRP Rule 1 (Definition of Mutual Jurisdiction) and UDRP Rule 3 (b) (xiii) (Form & content of the complaint)

¹²⁰¹ This is not a contractual obligation, as the complainant has no contractual relationship with the registrar or the respondent.

¹²⁰² M Froomkin fn 1041 705

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the complainant must submit to this mutual jurisdiction, it does not *explicitly* state that this jurisdiction is *exclusive*. This raises the question to what extent courts other than those mentioned in Rules 1 and 3 (b) (xiii) have found themselves competent to hear an action intended to reverse a panel decision under the UDRP.

In the decision of *Barcelona.com v Excelentísimo Ayuntamiento de Barcelona* the 4th Circuit of the US Court of Appeals found that it had jurisdiction not on the grounds of the mutual jurisdiction as defined in the UDRP, but based on US federal trade mark jurisdiction.¹²⁰³

The US Anticybersquatting Consumer Protection Act 1999 (ACPA), incorporated in the Lanham Act (Trademark Act of 1946) allows an aggrieved domain name registrant to seek relief against an overarching trade mark owner by asking for a declaration that he or she did not infringe the Lanham Act and an injunction to have the domain name returned.¹²⁰⁴ In the *Barcelona.com* case the Appeals Court found that the District Court had wrongly applied Spanish law to the question of whether the Complainant had trade mark rights in the domain name. The Appeals Court found that this question should only be decided under *US trade mark law*, and since the Lanham Act did not recognise trade marks in geographical denominations, the domain name was not entitled to protection and hence the domain name registrant had not infringed the Complainant's trade mark rights.

This ruling is problematic, as it means in effect that domain name registrants can defeat a trade mark owner winning under the UDRP by bringing an action under the

¹²⁰³ *Barcelona.com, Incorporated v. Excelentísimo Ayuntamiento De Barcelona* 330 F3d 617, 625 (4th Circuit 2003): 'Jurisdiction to hear trademark matters is conferred on federal courts by 28 USC §§ 1331 and 1338 and a claim brought under the ACPA, which amended the Lanham Act, is a trademark matter over which federal courts have subject-matter jurisdiction'. See also the earlier case of the 1st Circuit US Court of Appeals *Jay D Sallen v Corinthians Licenciamentos* 273 3Fd 14, 23 (1st Circuit 2001)

¹²⁰⁴ The relevant s. of ACPA (15 USC § 1114 (2) (D) (v)) provides:

'a domain name registrant whose domain name has been suspended, disabled, or transferred under a policy [such as the UDRP] may upon notice to the mark owner, file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful (...). The court may grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant':

See also *Storey v Cello Holdings LLC* 347 3Fd 370, 382 (2nd Cir NY 2003)

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ACPA before the US federal courts, so long as the complainant has no trade mark rights recognised under the Lanham Act, ignoring any foreign trade mark rights. It could be argued that this effectively applies US trade mark standards to *all* domain name disputes.¹²⁰⁵ A foreign (non-US domiciled) registrant could sue before the US federal courts if the courts have personal or *in rem* jurisdiction over the defendant trade mark holder. Again it is likely that the courts would establish *in rem* jurisdiction (in the absence of personal jurisdiction) on the basis of the location of the Registry.¹²⁰⁶

The Court of Appeals did not discuss the nature of domain names and the ubiquity of their use. If the City of Barcelona had brought parallel proceedings before the local courts in Spain, and assuming that these courts would have found that the registrant had infringed the City of Barcelona's trade mark rights by the use of the domain name under Spanish law, so that the Spanish courts had ordered the domain name to be transferred or cancelled, the Registrar would have been subject to two conflicting court orders concerning the same name.¹²⁰⁷ The ACPA essentially applies US federal trade mark law to all cases brought under the UDRP.

In *Storey v Cello Holdings LLC* the Second Circuit Court of Appeals held that the registrant may file a case in another court than the courts defined in the mutual jurisdiction, pointing to the first sentence of paragraph 4 (k), which expressly states that either party can seek independent resolution of the dispute in any court of competent jurisdiction. In other words the Second Circuit was of the opinion that the definition of mutual jurisdiction in the UDRP does not limit the registrant's choice of courts, and a court may find that it has jurisdiction based on some other law. The Court in that case said that the only significance of the mutual jurisdiction

¹²⁰⁵ See also L. Helfer fn 1024-498

¹²⁰⁶ See also *Harrods Ltd v Sixty Internet Domain Names* 302 F.3d 214, 224 (4th Cir VA 2002): "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction"; however the author has only found cases where a foreign trade mark owner sued registrants under the *in rem* jurisdiction under 15 USC § 1125 (d) (2) (A), but no cases where a foreign registrant attempted to recover a domain name from a trade mark holder.

¹²⁰⁷ But see the *Continental Airlines* case, below fn 1211

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is that, if the registrant wishes to prevent or delay implementation of the UDRP panel decision it should bring an action in a court of mutual jurisdiction.¹²⁰⁸

Furthermore, the US ACPA also contains far-reaching long arm provisions on jurisdiction. It allows trade mark holders to bring an *in rem* action against a domain name in the judicial district in which the domain name registry is located¹²⁰⁹, if the registrant is outside the reach of personal jurisdiction of the US courts.¹²¹⁰ For example in *Continental Airlines Inc v Continental Airlines.com*¹²¹¹ a South-Korean national, Mr Park had registered, *inter alia*, continentalairlines.com with Neptia, a South Korean registrar. On losing in the NAF decision¹²¹², which ordered the transfer of the domain name to the trade mark holder, Continental Airlines, Mr Park started proceedings in the District Court of Incheon in South Korea, an action, which of course suspended the implementation of the UDRP decision. This prompted Continental Airlines to file a competing action *in rem* under the ACPA and the Court found trade mark infringement under the Lanham Act and ordered the Registry to change the registrar for the domain name to a registrar in the US, for subsequent transfer of the domain name to the trade mark holder.¹²¹³ This possibility of *in rem* actions under ACPA effectively defeats the protection for registrants under the UDRP, which allows them to sue in the courts at the location of the registrar or in their own courts. The *in rem* action trumps the registrant's right to have his rights declared by a local court.

In the case of *NBC Universal Inc v NBCUniversal.com* the District Court came to the same conclusion and allowed the *in rem* action to proceed in similar circumstances. The Court found that the trade mark holder had not waived their right to file proceedings in a federal court by submitting a complaint (with the mutual jurisdiction clause) under the UDRP. The Court also addressed the issue of

¹²⁰⁸ *Storey v Cello Holdings LLC* 347 3Fd 370, 380 (2nd Cir NY 2003)

¹²⁰⁹ At the time of writing in August 2006, there were 19 top level domain names and 19 registries, 12 of which are based in the US. The .com Registry is VeriSign Inc, based in Dulles, Virginia.

¹²¹⁰ 15 USC § 1125 (d) (2) (A)

¹²¹¹ 390 FSupp 2d 501 (District Court ED Va 2005)

¹²¹² NAF Case No 250002 *Continental Airlines Inc v Park*

¹²¹³ Fn 1211 509

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comity and jurisdiction in these *in rem* actions and said that there was no requirement for abstention by the US federal court, as the Korean proceedings were not an *in rem* action. However, the Court ultimately left open the possibility that in different circumstances comity may warrant the US federal court to abstain from a ruling. In this case the Korean registrant had not provided any evidence that the Korean court had actually taken any steps towards solving the dispute.¹²¹⁴

(c) Conclusion

This snapshot of court cases has hopefully shown that there is a requirement for an appeal under the UDRP, as the ability to bring a case before the ordinary courts is not sufficient to rectify mistakes at the UDRP level. Since court proceedings are parallel proceedings based on different procedures and different substantive law, they do not contribute to streamlining the vast quantity of decisions rendered under the UDRP and to reducing the inconsistency between these different panel decisions.

Nor is individual justice well-served. Court proceedings are expensive and in international conflicts, involve the usual running of the gauntlet around questions of jurisdiction and applicable law, as just illustrated.¹²¹⁵ Parallel proceedings in different courts, conflict of law issues and conflicting court decisions may feature dominantly in domain name disputes, as these are frequently international and involve trade mark issues, on which national standards still vary considerably.¹²¹⁶ The court decisions discussed in this section do not contain a discussion of the ubiquity of domain names due to the fact that the internet can be accessed from

¹²¹⁴ *NBC Universal Inc v NBCUniversal.com* 378 FSupp2d 715, 717 (District Court ED Va 2005), motion to dismiss action for lack of jurisdiction dismissed; see also the similar case of *Cable News Network LP v CNNEWS.com* 66 USPQ 2d 1057 (4th Circuit 2003) not reported in Federal Reporter; the US Court of Appeals for the 4th Circuit confirmed that the US District Court had properly assumed jurisdiction against the Chinese domain name registrant in an *in rem* action ordering transfer of the domain name.

¹²¹⁵ Only a remarkably small percentage of UDRP cases ended up in court, less than 1 %, see L Helfer fn 1024 495

¹²¹⁶ Especially in relation to geographical denominations, name rights and the recognition of unregistered trade marks and unfair competition law.

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anywhere and any discussion of how jurisdiction and applicable law in trade mark cases can be limited by concepts of targeting.

This jurisdictional and conflicts of law quandary means that the courts will not provide effective redress in many situations and this lack of access to the courts means that the absence of an appeal under the UDRP is not healed by the fact that parties are not prevented from starting court proceedings. An appeal process is therefore necessary to further individual justice and to achieve more consistency and hence more authority for UDRP decisions.

3.2.8 Transparency

The UDRP dispute resolution providers maintain a list of their panel members with a link to their CVs. Furthermore, unlike arbitration awards, the reasoned UDRP decisions are publicly available from the dispute resolution providers' websites.¹²¹⁷

Two providers, WIPO and NAF even provide some limited keyword search facilities for their databases of decisions. Thus, it seems fair to say that the UDRP process is more transparent than commercial arbitration. The fact that decisions are published has undoubtedly enabled academic criticism and awareness of the shortcomings of the UDRP.

3.3 Conclusion

In conclusion, the UDRP has several serious procedural deficiencies, which impinge on the due process granted to the parties. The UDRP should be improved by ensuring that the panel list is not composed of a majority of trade mark attorneys and by ensuring that panellists are allocated randomly, or preferably, that all cases are heard by panels chosen by the parties. There should be an internal appeal system to a different body of panellists, allowing the parties to challenge decisions on both

¹²¹⁷ Paragraph 4 (j) UDRP Policy and UDRP Rules 15 (d) (providing for reasons) and 16 (b), see http://www.wipo.int/amc/en/domains/search_index.html , <http://domains.adrforum.com/decision.aspx> , <http://www.adndrc.org/adndrc/index.html> [14. September 2007]

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procedural and substantive grounds. Furthermore the time-limit for filing the response should be extended significantly and provision be made for additional filings and online hearings. It should be ensured that the procedure is held in a language which both parties can understand. Finally, the UDRP should be binding on corporate entities to avoid tactical litigation.¹²¹⁸

This section has shown that the UDRP is not as such a model procedure for online arbitration of internet disputes. The UDRP was drafted with the model of commercial arbitration in mind. But as has been shown, this is inappropriate for a procedure which is mandatory and coercive and, which therefore is more in the nature of an international, public dispute resolution procedure. Nor are the defects in the UDRP cured by the rule that the parties can go to court to rectify a bad panel decision, as the courts frequently are not accessible, because of the costs and the jurisdictional quagmire associated with international disputes, which the UDRP was supposed to overcome in the first place. For these reasons the UDRP should be reformed.

This Chapter has found that both B2C arbitration and the procedure under the UDRP are unfair, because they have been modelled on traditional arbitration. Having examined two paradigms for internet disputes, namely consumer disputes and domain name disputes, this Chapter will conclude by reflecting on a different model, which should be termed the 'proportionate model of dispute resolution'. This concept of the proportionate model of dispute resolution shall serve as the theoretical basis for the conclusions in this thesis which will be contained in Chapter Eight.

¹²¹⁸ See Example 3 discussed in Chapter 3-3 and in Chapter 8-2.1.3 (c)

4. Proportionate Model of Dispute Resolution

This Chapter argues that due process should apply to internet disputes¹²¹⁹. This means that such disputes should not be entirely relegated to the private dispute resolution field with the consequence that no due process protections apply. It is suggested that the dichotomous model of dispute resolution be abandoned.

4.1 Two spheres one public-one private

The current model of dispute resolution is dichotomous, consisting of two conceptually¹²²⁰ separate spheres: one public (traditional court litigation), the other private (ADR processes, including arbitration). In traditional court litigation, high standards of due process are applied, whereas in arbitration, the parties are deemed to have waived some important due process standards, simply by agreeing to this form of dispute resolution, which is deemed private. As explained in Chapter Six, much less stringent standards of due process have in practice been applied to traditional, commercial arbitration.

This dichotomy of our current perception of dispute resolution stems from the fundamental distinction between private and public law in Western law systems. The reason for this distinction is that the law protects two potentially conflicting, fundamental principles, *ie* individual autonomy and contractual freedom on the one hand and, on the other hand, the supremacy and pervasiveness of fundamental values and human rights.

The potential conflict between these two principles is solved by dividing the law in a public (pertaining to the state) and private (pertaining to the individual) sphere.¹²²¹

¹²¹⁹ For the definition of relevant internet disputes-Chapter 3

¹²²⁰ These spheres are linked by court-mandated forms of ADR and the involvement of courts in arbitration (not discussed in this thesis) but conceptually they are separate, nevertheless.

¹²²¹ Albeit that the public-private dichotomy has recently come under attack: see for example, from an administrative law point of view, J Freeman 'The Private Role in Public Governance' (2000) 75 *New York University Law Review* 543-675, 547-548. She regards governance as a series of negotiated relationships.

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Human rights and due process apply in the former, whereas they do not apply in the latter.

4.2 Privatization of public functions

The privatization of functions which have traditionally been regarded to be public, such as dispute resolution, raises two related questions.

First it has to be asked whether human rights should apply to such privatized functions carried out by private (non-state) actors.¹²²² Otherwise, the privatization of law risks obliterating human rights protections, such as the right to a fair trial and due process in dispute resolution.¹²²³

Secondly the question arises how it can be ensured that all stakeholders are involved to make privatized law democratic. Privatized law is inevitably shaped by contractual arrangements, and these contractual arrangements in turn are likely to be determined by the party with the greater bargaining power, as pointed out by *E Thornburg*: 'Internet disputes have been privatized in ways that provide substantial advantages to the already powerful'.¹²²⁴ Privatized law risks lacking in legitimacy, if not all interests of stakeholders are taken into account and balanced against each other.¹²²⁵

571. She admits, however that the constraint of private law on private discretion is not sufficient, 591 and she suggests additional checks on private actors, 593. See also the art. by *RH Mnookin* 'The Public/Private Dichotomy: Political Disagreement and Academic Reputation' (1982) 130 *University of Pennsylvania Law Review* 1429-1440, 1430 et sequi who argues that the line between private and public may be impossible to define generally.

¹²²² This is a concern which has been voiced by *Lawrence Lessig* in relation to internet regulation, see *L Lessig Code and Other Laws of Cyberspace* (Basic Books New York 1999) 217-218

¹²²³ *E Thornburg* fn 641 154, 218

¹²²⁴ *E Thornburg* fn 641, 153

¹²²⁵ *M E Price and SG Verhulst* 'In Search of the Self' in *C Marsden Regulating the Global Information Society* (Routledge London & New York 2000) 57-78, 64. *Jarrold Wiener* points out that it is a liberal myth that private regulation is apolitical and cannot be regulated by the state, see *J Wiener Globalisation and the Harmonization of Law* (Pinter London & New York 1999) 28. A general discussion of globalisation and self-regulation are outside the scope of this thesis. The purpose of this paragraph is merely to place into context the much more specific quest about what due process standards ADR for internet disputes should adhere to.

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The primary focus of this thesis is on the first issue, but the second issue is related to the first issue. If private procedures are shaped by the more powerful interest group they are likely to infringe on the due process rights of the weaker group.

For example, the reasons for the procedural deficiencies in B2C arbitration are that the arbitration clause is contained in a non-negotiated contract.

Furthermore, the reasons for the procedural deficiencies of the UDRP are that it was largely designed by WIPO with the needs of trade mark holders in mind and in particular with overwhelming emphasis on speed and low-cost at the expense of due process. This problem arises if a dispute resolution procedure is drafted by one stakeholder group and not the other or as *Michael Froomkin* has said in the UDRP context:

‘It remains the case that if you put a committee of foxes in charge of a chicken coop, you tend to get a lot of happy foxes and a lot of dead chickens.’¹²²⁶

The concern of this Chapter is the risk of obliterating due process in online arbitration because of its alleged private nature. Whether or not this risk materializes depends on where the line for the application of due process is drawn.

4.3 The waiver doctrine- fully informed and voluntary approach

At present, the waiver doctrine discussed in Chapter Six¹²²⁷ is the tool for this demarcation in the context of traditional commercial arbitration. According to this doctrine, arbitration is truly private, since the parties have opted out of public dispute resolution and thereby have waived some or all of their rights to a fair trial.

¹²²⁶ M Froomkin fn 1041 716

¹²²⁷ 6-2.5

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Just to recap what has been explained in Chapter Six¹²²⁸ in the US, the parties are indeed regarded as having absolutely waived their due process rights guaranteed under the Constitution. The US approach is clear-cut, the state action doctrine does not apply to arbitration, as arbitration is regarded to be a *private* form of dispute resolution, outside the constitutional reach.

By contrast, under the ECHR, the question, whether or not the right to a fair trial applies to arbitration, is contentious and opaque. My conclusion in Chapter Six was that under the ECHR, although due process is not completely inapplicable, some due process rights are automatically and implicitly waived by the parties resorting to arbitration as a process of dispute resolution.¹²²⁹ The European doctrine is that some elements of due process, such as transparency, the right to an appeal or some aspects of fair hearing (such as extensive disclosure under English litigation) or the complete independence of arbitrators are not applicable to arbitration *because of* the very nature of arbitration.¹²³⁰ The logic is that if the parties have chosen arbitration as a process, then they have accepted these characteristics of arbitration and thereby waived these aspects of their right to a fair trial. Furthermore, other aspects of due process can be specifically waived, for example where the arbitrator discloses a relevant conflict of interest and the parties omit to challenge the appointment.¹²³¹

The waiver doctrine under European and US law, allows parties to opt out of the state court system and to choose a form of dispute resolution allowing for flexibility of procedure, speed, efficiency and possibly lower costs. Therefore this doctrine makes sense for traditional commercial arbitration, where the parties are roughly of equal bargaining power and, as business parties, are aware of the implications of arbitration or have, at least, access to professional advice. Traditionally, arbitration has been used for business disputes and in the commercial field the waiver doctrine makes eminently sense.

¹²²⁸ 6-2.5.2

¹²²⁹ 6-2.5.1

¹²³⁰ 6-2.5.1

¹²³¹ 6-2.5.1

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One could argue that this problem of unfairness could be solved by only holding an arbitration clause valid if both parties were fully informed and voluntarily agreed the arbitration clause.¹²³² This largely reflects the approach under the ECHR. As explained above, to comply with the right to a fair trial under Article 6 of the ECHR, a waiver of the right to go to court must be fully informed and voluntary.¹²³³ This approach is also espoused by some US scholars, who argue that an arbitration clause should only be valid if it is a knowing and voluntary waiver of the right to go to court.¹²³⁴ For this test it is necessary to assess the visibility and clarity of the arbitration agreement, whether both parties understood its significance (knowledge) and whether there was any choice, *ie* whether the party could have contracted with an alternative provider.¹²³⁵

4.4 Internet disputes and the waiver doctrine

But in relation to internet disputes, if the parties are subject to a power imbalance, the waiver doctrine does not make sense, as here arbitration is not entered into voluntarily. Arbitration is not voluntarily since the more powerful party makes the weaker party contract on the more powerful party's terms (as in B2C cases) or since arbitration is mandatory through a contractual regulatory regime (as in the UDRP). Arbitration is also not voluntary, as in many cases it will be the only available and affordable means of redress.

Hence, this 'fully informed and voluntary approach' is no real solution to the problem of finding a fair dispute resolution mechanism for internet disputes. Where the parties are located at a distance and particularly, where there is a considerable power imbalance between the parties, the parties should not be deemed to have

¹²³² See above 6-2.5.1

¹²³³ 6-2.5.1

¹²³⁴ R Reuben fn 128 1022

¹²³⁵ R Reuben fn 128 1022-1034

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waived their due process rights as there are serious doubts as whether this waiver is voluntary.

The rationale for the use of arbitration for internet disputes is not to opt-out of the state court system, but to provide an affordable and fair means of redress. If online arbitration complies with due process there is no requirement for a waiver.

4.5 The proportionate model explained

A new paradigm is required for these kinds of disputes and this should be termed ‘the proportionate model of dispute resolution for internet disputes’. Proportionate due process protections should be introduced to deal with power imbalances and distance disputes. This model takes an all-encompassing approach to dispute resolution and bridges the current dichotomy between private and public dispute resolution. The idea here is that all dispute resolution is public to an extent, as it involves the carrying out of a public function and that for this reason due process should apply to all forms of dispute resolution, but on a proportionate basis.

Fairness requires different standards of due process depending on the nature of the dispute and the parties involved.¹²³⁶ But this does not alter the thesis that a minimum of fairness and due process standards should apply to online arbitration of internet disputes¹²³⁷.

Richard Reuben writing about arbitration in general, has described this approach in his unitary theory of dispute resolution. He uses the metaphor of a planetary system. The closeness of each planet to its sun determines the gravitational pull. In the same manner, so he argues, the closer a form of dispute resolution is to the power of the state, the higher the standards of due process applied to that dispute resolution. Therefore the gravitational pull is the highest for litigation, less so for arbitration

¹²³⁶ G Richardson, H Genn fn 50 122, see also 6-4.2.2

¹²³⁷ For the discussion of the relevant disputes see Chapter 3

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and the least for mediation.¹²³⁸ He describes this as ‘minimum, but meaningful due process standards’ for arbitration.¹²³⁹

His theory should be adapted to the Model of dispute resolution for internet disputes espoused in this thesis. Since online arbitration used for internet disputes will encounter a great variety of disputes, a distinction should be made between different types of arbitration. Commercial arbitration between business parties would orbit further away from the due process centre than arbitration involving parties with power imbalances and those where arbitration is mandatory (such as the UDRP). Hence the Model of resolution for internet disputes outlined in Chapter Eight is an intermediate form of dispute resolution positioned between litigation and commercial arbitration, providing for a minimum of due process. This intermediate model would also be a solution to the conflict between due process and access which has been described in Chapter Two¹²⁴⁰. It would reduce the formality of disputes resolution, allowing for more flexible procedures and hence increasing access without waiving due process completely.

This dilemma of providing out-of-court dispute resolution for internet disputes without prejudicing an individual’s right to a fair trial has also been recognized by the European Commission in Article 17 (2) of the E-commerce Directive 2000/31/EC (in relation to consumers):

‘Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.’

The idea of a proportionate model of dispute resolution may offer a solution to this dilemma.

¹²³⁸ R Reuben fn 128 1047-1048

¹²³⁹ R Reuben fn 128 1047-1048, 957

¹²⁴⁰ 2-6

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In conclusion, this means there is a requirement to design private dispute resolution systems which have public due process safeguards incorporated.

5. Conclusion

This Chapter has looked in depth at consumer arbitration and found that certain pre-dispute arbitration clauses in business to consumer contracts are invalid in the UK, whereas in the US such clauses are frequently enforceable. This Chapter has also examined the UDRP as a dispute resolution procedure, modeled on commercial arbitration, which is mandatory and coercive. This Chapter has shown that neither the US model of consumer arbitration nor the model of the UDRP administrative procedure are fully respecting due process with the result that they are unfair.

This Chapter has argued that the traditional model of commercial arbitration using only abbreviated due process protections is not suitable for internet disputes and it explained that online arbitration of internet disputes was fundamentally different from the traditional arbitration model, since arbitration may not be an alternative to court litigation, but the only process which can provide a remedy for an aggrieved party. Furthermore, under the traditional paradigm there is an implicit acceptance (despite some rhetoric to the contrary) that arbitration provides lower standards of due process, but that the parties have freely waived their rights and are therefore autonomous to fashion the procedure according to their needs. This does not make sense where one party imposes arbitration on the other or arbitration is mandatory and/or there is no other viable redress.

Furthermore the traditional paradigm accepts that lower due process rights can be against public policy in certain types of disputes where there is a strong power imbalance, such as business to consumer disputes. However, in order to protect the weaker party arbitration has been restricted for these types of disputes (at least in the form of pre-dispute arbitration clauses) or, as in the UDRP, the dispute resolution mechanism is not final.

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This paradigm needs to be changed. Online arbitration is a necessary dispute resolution mechanism for internet disputes and in particular for those disputes where there is a strong power imbalance between the parties. Therefore rather than excluding these disputes from arbitration or making the process not final, higher due process guarantees should ensure that the process is fair. Since the waiver doctrine does not apply (no voluntary relinquishment of rights) full due process should apply to online arbitration for consumer and other internet disputes (as defined in Chapter 3). The new model proposed would be to allow pre-dispute arbitration clauses for all disputes, but impose stricter due process standards for internet disputes. The final Chapter of this thesis will explore what the minimum due process standards should be and how they should be implemented for a fair model of dispute resolution.

Chapter 8: A Model of Dispute Resolution for the Internet

“Reform? Reform? Are things not bad enough already?”

(Sir John Astbury 1926)

1. Introduction

Given the limitations of existing court procedures and other dispute settlement mechanisms, Chapters Three and Five have demonstrated a need for binding online arbitration mechanisms to solve internet disputes. Online arbitration as a mechanism is likely to capture a whole range of internet disputes which cannot be solved by any other means.

Chapter Six has shown that, by comparison to the safeguards adopted in common law and human rights doctrine, due process is a low priority in commercial arbitration. This has traditionally been justified by the principle that the parties should be able to fashion their own procedure (principle of party autonomy) and that the parties have waived some of their due process rights (waiver principle). The reason for a streamlined procedure in arbitration is that it permits the parties to make dispute resolution more efficient and allows for confidentiality and some degree of informality.

However, if the same principles are applied to arbitration in situations where the parties are subject to a significant power imbalance, have no access to litigation and/or where arbitration is mandatory, this renders the procedure potentially unfair. In Chapter Seven, the discussion of consumer arbitration and the analysis of the UDRP have flagged unfairness problems, caused by the fact that these procedures are modelled on traditional, commercial arbitration. For this reason, it has been argued in Chapter Seven that private, commercial arbitration without more does not

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provide a suitable model for the resolution of the internet disputes. Chapter Seven has concluded that an intermediate form of dispute resolution has to be found, providing for due process but without the formality and complexity of litigation. The conclusion from this is that online arbitration complying with minimum due process standards can be used to fill this void.

Fairness has three constituent elements, which have been explained in Chapter Two: due process, access and the counterpoise. Hence in addition to due process, the Model has to ensure that dispute resolution for internet disputes is accessible and rebalances (to an extent) pre-existing power imbalances.

The main task of this Chapter Eight is to outline the parameters for a workable Model of fair dispute resolution for internet disputes, drawing on the conclusions from previous chapters. This Model applies to internet disputes where one parties is a corporate entity and the other an individual or where both parties are individuals.¹²⁴¹ In order to accomplish this task, themes are discussed which can be best circumscribed by the following four questions: (i) how to bring the parties to online arbitration? (ii) what are the minimum standards which should apply to the resolution of internet disputes? (iii) how to implement the due process standards? (iv) what are the costs and who should bear these?

2. Bringing the Parties to Arbitration

The first issue a Model for the resolution of internet disputes has to address is how to bring the parties before the (online) arbitrator. Traditional, commercial arbitration is based on an agreement between the parties to arbitrate.¹²⁴² Such an agreement can be concluded at the outset, before the dispute has arisen, and provided it is in writing, this agreement is binding and enforceable.

¹²⁴¹ See 3-6

¹²⁴² Discussion in 4-3.2

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In Chapter Seven¹²⁴³ it has been explained that an exception to this are (most) pre-dispute consumer arbitration agreements in the EU/EEA, which may not be binding on or enforceable against the consumer. More generally, it is questionable whether it is fair if the more powerful party effectively imposes arbitration on the 'weaker' party.¹²⁴⁴ However, even if the use of pre-dispute consumer arbitration clauses raised no fairness issues, it would be unlikely that they would be adopted by companies in the EU/EEA to the same extent as they are in use in the US. The reason for this preponderance of arbitration clauses in contracts used by US corporations is that specific features of US litigation, such as the availability of class actions, jury trial and punitive damages provide incentives for the more powerful party to avoid litigation in favour of arbitration.¹²⁴⁵ The same incentives do not exist in the EU.

Hence it could be said that it is necessary that the arbitration agreement is concluded after the dispute has arisen. This immediately raises the question whether the respondent will agree to arbitration at this stage.¹²⁴⁶ Such agreement is unlikely if the claimant is the 'weaker' party in an internet dispute without effective access to dispute resolution in the courts.¹²⁴⁷ If the 'weaker' party (such as an individual in state A) has no access to the courts why would the 'stronger' party (such as a multinational company involved in e-commerce established in state B) agree to arbitration?

This Catch-22 situation is a serious obstacle to the availability and feasibility of online arbitration for internet disputes.¹²⁴⁸

¹²⁴³ 7-2

¹²⁴⁴ Discussion in 7-2, which, by way of example, has illustrated this in the context of consumer arbitration

¹²⁴⁵ A detailed discussion of US civil procedure is outside scope. For further details of this argument see Christopher Drahozal and Raymond Friel fn 942 131

¹²⁴⁶ G-P Calliess fn 177 19

¹²⁴⁷ Bamford fn 790 109; Paragraph 'Enforcement' Report 'The European Online Marketplace: Consumer Complaints 2005', published by the EEJ-net in June 2006

¹²⁴⁸ For further details see the discussion in 5-6 on the reasons for low usage of ODR

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The concern of this thesis is access and this includes the availability of fair and proportionate dispute resolution for internet disputes. The availability of online arbitration as a form of redress can only be secured by some form of encouragement or compulsion to take part in arbitration.

In order to make such an obligation to arbitrate fair in a situation of power imbalance in respect of internet disputes, it *should* only be imposed on the more powerful party (in this thesis corporate entities) and not on the weaker party (in this thesis individuals, including consumers).¹²⁴⁹ There seems to be consensus among consumer organizations and policy makers that consumers, for example, should not be bound by a pre-dispute arbitration clause.¹²⁵⁰

Such an asymmetric obligation on participation in arbitration or adjudication¹²⁵¹ is justified by the need to redress the power imbalance between the parties (the counterpoise), defined as the third principle of fairness and discussed in Chapter Two¹²⁵². Hence the asymmetric obligation would be a procedural tool used to level the power imbalance between the parties.

¹²⁴⁹ See eg Ombudsman schemes discussed below 8-2.2; this raises the question whether in a dispute between two individuals (raising no power imbalances) the parties should be bound by the online arbitration clause. The argument in favour of this is that second generation internet is much more interactive than the early internet and that hence there is a greater likelihood of individual to individual disputes

¹²⁵⁰ M Doyle et al fn 424 78; this is also a requirement of the OFT's Consumer Code Approval Scheme, discussed 8-2.1.3, see Condition 4d Consumer Code Approval Scheme, Core Criteria and Guidance dated November 2006, OFT 390; see also Consumers International fn 432 29-30 (Recommendations) and see also Principle VI, 2nd Sentence of EC Recommendation 98/257/EC; see also the AAA Consumer- Related Disputes Supplementary Procedures of 15. September 2005, available from <http://www.adr.org/sp.asp?id=22014> [14. September 2007] and the AAA Due Process Protocol for Consumers Principle 5; BEUC Position Paper 'Alternative Dispute Resolution' of 21. November 2002 BEUC/X/048/2002, 4-6; TACD (Transatlantic Consumer Dialogue) 'Alternative Dispute Resolution in the Context of E-commerce' Position Statement of February 2000, E-comm 12-00, Resolution No 4 available from <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=41> [14. September 2007]; Bamford fn 790110; OECD Report fn 430 20

¹²⁵¹ The term 'adjudication' in this thesis is used as a neutral term to mean a form of dispute resolution involving a third party making a decision binding on the parties, and is to include arbitration, ombudsmen and litigation.

¹²⁵² See the third principle of fairness, *ie* the need to counterbalance pre-existing inequalities 2-2.3

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It means that the individual *should* be able to choose between online extra-judicial adjudication and litigation, whereas the corporate entity *should* have to agree to submit to the extra-judicial adjudication procedure once a dispute arises. However, after a dispute has arisen, once the individual has agreed to extra-judicial adjudication, both parties *should* be bound by the decision of the adjudicator, provided the adjudication is fair¹²⁵³.

The challenge is to introduce such an asymmetric obligation into the relationship between the parties. This can be done through a contractual membership scheme and/or making online extra-judicial adjudication compulsory by law,

2.1 Contractually mandated schemes

The first possibility is to bind corporate entities to online arbitration through a contractually mandated scheme operated by a trusted party. This is essentially a contract between one (or each) party and a trusted party, which contains an arbitration agreement covering the internet disputes which may arise. On an abstract level, the principle behind this is that the trusted party has the power to entice the more powerful party (the corporate entity) to agree to arbitration of all internet disputes, thus obviating the need for the parties entering into a direct arbitration agreement between themselves. In contract law terms, there are two different models for contractually mandated schemes:

2.1.1 Arbitration agreement between participants

This model is equivalent to a club or association making rules and conditions for all its members, agreed to by each member as a condition of membership and governing the contractual relationships *between* the members. Although such a contract cannot be neatly analysed into offer and acceptance, it is nevertheless a

¹²⁵³ See the fairness standards discussed in 8-3

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binding contract *between* each member.¹²⁵⁴ If later a dispute arises between two members, this will be governed by the rules agreed between the trusted party and each member.

For example, the operator of an online marketplace (such as an online auction or a B2B trading platform) or an online discussion forum (such as a blog) could impose online arbitration on participants for the resolution of disputes *among* participants in the online marketplace or discussion forum. The operator would act as a trusted party obliging each participant to agree to solve any disputes with other participants by online arbitration.¹²⁵⁵ This agreement could be made when participants join the marketplace or forum, as a condition of membership.

In order to prevent any unfairness against individuals, such a scheme could provide that this obligation to submit to arbitration only applies to corporate entities. Individuals are encouraged to take part in online arbitration, but are free to choose litigation instead.

For example, eBay the online auction platform provides an internal dispute resolution mechanism through its 'Item Not Received or Significantly Not as Described', 'Unpaid Item' and 'Mutual Feedback Withdrawal',¹²⁵⁶ programmes, which can be instigated by buyers or sellers against the other party respectively. These dispute resolution programmes consist of online, assisted negotiation between the parties and also an insurance element¹²⁵⁷, but do *not* include online

¹²⁵⁴ As in the rules for the regatta in *The Satanita* [1895] p.248, *Clarke v Dunraven* [1897] AC 59 mentioned in G Treitel *The Law of Contract* (11th Edition Sweet & Maxwell 2003) 47

¹²⁵⁵ Probably containing an escalation clause, providing first for online conciliation or mediation, and if this fails, using online arbitration.

¹²⁵⁶ Feedback is a crucial tool for sellers on online auction platforms to enhance their reputation. Buyers are encouraged to leave feedback on a particular seller's performance which in turn informs future buyers about this seller's trustworthiness and a seller with a bad feedback rating is unlikely to be able to sell. Hence, there may well be arguments about the appropriateness of feedback, which this programme is intended to address.

¹²⁵⁷ The eBay Standard Purchase Protection Programme, which provides reimbursement of a maximum of £105, subject to certain conditions, see <http://pages.ebay.co.uk/help/tp/esppp-process.html> [14. September 2007]

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arbitration.¹²⁵⁸ If the dispute cannot be solved internally, a complainant can take the dispute to an external dispute resolution provider, Squaretrade, providing mediation services.¹²⁵⁹ For higher value disputes, buyers and sellers can use an escrow service.

However, there is no direct referral to online arbitration and no obligation on either party to participate in arbitration of any kind. Arguably eBay's dispute resolution could be given more teeth, if corporate buyers and sellers agreed to submit to online arbitration as the ultimate redress mechanism, to be used as a last resort in an escalated procedure. The reasons for this lack of online arbitration may be that many items bought and sold on eBay are of small value¹²⁶⁰ and many transactions are between individuals (including consumers).

All online marketplaces, discussion fora and other interactive platforms should consider the incorporation of an obligation for corporate entities to agree to online arbitration.

2.1.2 Arbitration agreement for the benefit of a third party claimant

The second model incorporates online arbitration into the membership agreement for the benefit of a third party claimant, used where a claim arises from an online activity, but the claimant is not a participant in the activity or a member of the organisation..

An example of this is a trade association, whose members commit to solve any disputes with third party buyers by online arbitration.¹²⁶¹ A second example would be a claimant who has been defamed on a discussion forum or other online platform but who is not a member of this forum. In either example, the third party will not be

¹²⁵⁸ <http://pages.ebay.co.uk/help/tp-problems-dispute-resolution.html> [14. September 2007]

¹²⁵⁹ https://www.squaretrade.com/cnt.jsp/odr/overview_odr.jsp;jsessionid=fivpeet8z1?vhostid=chipotle&stmp=ebay&cntid=fivpeet8z1 [14. September 2007]

¹²⁶⁰ The appropriateness of online arbitration in relation to small disputes is further discussed below, 8-5

¹²⁶¹ This construction may raise problems regarding the independence of the online arbitration institution and/or the arbitrators, see the discussion of standards 8-3

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privity to that contractual agreement so that the question arises whether the third party could rely on and enforce this arbitration agreement.

In the UK, section 1 of the Contracts (Rights of Third Parties) Act 1999 confers a right to enforce a contract term on a party not privy to the contract, if the contract intentionally provides a benefit for that party, provided the party is at least identified as a member of a class in the contract.¹²⁶² Section 8 (2) furthermore provides that if the contract contains an arbitration agreement for the benefit of the third party and it is in writing, the third party may choose to use arbitration.¹²⁶³

Hence the third party buyer could rely on an arbitration agreement concluded between a seller and a trade association if the arbitration agreement is expressed to be for the benefit of the buyer. Likewise the person claiming defamation damages could also sue the defendant, if the arbitration agreement concluded between the defendant defamer and the operator of the discussion forum had envisaged a class of claimants to which the claimant belongs.

This raises the question of how such contractually mandated schemes could work in practice.

2.1.3 Contractually mandated schemes in practice

Two types of contractually mandated schemes could be established in practice: Codes of practice coupled with a trust mark incorporating online arbitration or online arbitration imposed by the rules and conditions of a platform.

¹²⁶² Section 1 (1) (b), (3)

¹²⁶³ Treitel points out that arbitration is optional for the third party, see G Treitel *The Law of Contract* (11th Edition Sweet & Maxwell 2003) 656-657. By contrast, if the third party wishes to enforce a substantive right arising under the contract which also contains an arbitration clause, then section 8 (1) applies and the arbitration clause is binding on the third party: *Nisshin Shipping v Cleaves* [2004] 1 Lloyd's Report 38 (Comm Ct) paras 38, 41 and 42

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(a) Codes of practice and trust marks¹²⁶⁴

In the consumer e-commerce context, this construction requires a sponsoring organisation. One possibility is that a trade or consumer organisation sponsors a code of practice, to which e-commerce businesses subscribe and to whose provisions they agree to conform.

In return for this subscription, business members are allowed to use a trade mark protected logo ('trust mark') indicating to consumers that the business is safe to transact with, thereby boosting the business' branding and the consumer confidence it attracts. If a business persistently offends against the terms of the Code, it may be expelled from the scheme, so that a sanction exists for non-compliance. However, a trust mark scheme financed by membership fees can only afford to lose so many members.¹²⁶⁵ One of the terms of the code of practice could be that e-businesses submit to online arbitration.

An example of this is provided by the OFT's Consumer Code Approval Scheme¹²⁶⁶. The OFT has established a programme for the approval of codes of practice, and if a code is approved, the businesses concerned are allowed to use the OFT logo. One of the terms of the OFT's Consumer Code Approval Scheme is that the code must include the availability of an independent redress scheme, which is binding in respect of code members and that the code member must accept any decision made under the scheme.¹²⁶⁷

¹²⁶⁴ Examples for trust mark schemes, which cannot be discussed here because of lack of space are Trusted Shops <http://www.trustedshops.com/merchants/index.html> and Euro Label <http://www.euro-label.com/euro-label/ControllerServlet> [14. September 2007], their codes, however do not provide for online arbitration. The Austrian certification body for Euro Label requires, however participation in the Austrian Internet Consumer Ombudsman for Austrian certified member businesses including compliance with a recommendation made by the Ombudsman, see the discussion in 5-3.2; BBB Online Reliability Code, which obliges members to agree to participate in binding arbitration under BBB Rules of Arbitration (Binding), if the consumer also agrees, http://www.bbbonline.org/reliability_dr.asp [14. September 2007]

¹²⁶⁵ G-P Calliess fn 177 9

¹²⁶⁶ This is, strictly speaking a secondary mark, establishing standards for Codes, rather than being attached to a particular Code

¹²⁶⁷ Condition 4d of the Consumer Code Approval Scheme, Core Criteria and Guidance dated November 2006, OFT 390

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However, trust marks only work if they serve to distinguish the products from one provider from those of another and for this to occur, consumers must be aware of a trust mark. Many well-known brands rely on their own branding and trust marks are being predominantly subscribed to by smaller businesses.¹²⁶⁸ Hence more thought should be given to the question of how consumer awareness about a trust mark can be raised, thereby making the trust mark more attractive for businesses.¹²⁶⁹

(b) Disputes arising from a platform

A second possibility would be that the operator of an online platform incorporates online arbitration in the membership terms. This second construction could be used where sellers and buyers engage in B2B or B2C e-commerce on an online platform, such as an auction platform.¹²⁷⁰

However it is by no means limited to e-commerce. Contractually mandated online arbitration could be extended to oblige participants in a whole range of online activities to take part in online arbitration for disputes between themselves or with third party complainants (provided the dispute resolution clause is for the benefit of third parties). Such schemes are not limited to contractual disputes related to e-commerce, but could encompass tort disputes such as defamation or copyright infringement.

An operator of an online forum, an online auction site, a site providing an opportunity for users to upload user generated content, such as homemade videos, or indeed any other internet service provider hosting users' content, could make it a condition of participation that users agree to online arbitration if a claim is made by a third party for, *eg* defamation or infringement of copyright.

¹²⁶⁸ G-P Calliess fn 177 9

¹²⁶⁹ Albeit that the OFT's Consumer Code Approval Scheme was publicized by a million pound advertising campaign, see Newsletter, Issue 7 available on the OFT website.

¹²⁷⁰ See also G-P Calliess fn 177 13

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For example, eBay has introduced a notice and take-down complaints system, called eBay VeRO programme, which allows third party owners of IP rights to complain about infringements of their rights through sales on eBay.¹²⁷¹ Once such a notice has been filed, eBay will take-down the allegedly offending item, without checking the validity of the notification.

This take-down on notice procedure has to be seen in the context of the EU rules on the liability of internet service providers for hosting illegal materials. An ISP is immune from liability only if they have no actual knowledge of infringement and are not aware of any facts or circumstances from which infringement would be apparent, and if they receive notice of such infringement they have to act expeditiously to remove the infringing material.¹²⁷² This means that the burden to litigate is shifted from the complainant IP owner, who can achieve the removal of allegedly offending items by mere notice, to the provider of the content, such as the seller on eBay, who has to litigate to re-instate the material.

An example of this is the recent case of *Quads4Kids v Campbell case*.¹²⁷³ The defendant had notified eBay that the claimant was selling children's dirt bikes allegedly infringing the claimant's registered design right. The claimant had to institute proceedings and obtained an injunction reinstating his sales on eBay on the basis that he had an arguable defence and that the use of the notice procedure was a groundless threat of proceedings for infringement of a Community design right.¹²⁷⁴

Instead of using a mere notice and take down procedure, access to dispute resolution could be increased if the parties used online arbitration to solve such a dispute, instead of litigation. The use of online arbitration in such cases may be

¹²⁷¹ <http://pages.ebay.co.uk/vero/participants.html> [14. September 2007]

¹²⁷² Article 14 (1) E-commerce Directive 2000/31/EC- a more in depth discussion of ISP liability is outside scope

¹²⁷³ [2006] AllER (D) 162 (Oct) (ChD) of 13. October 2006

¹²⁷⁴ Community Design Regulations 2005, SI 2005 2339 Regulation 2; see also the similar provisions in s.21 Trade Marks Act 1994, s. 70 Patents Act 1977

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quicker, possibly cheaper and more convenient to use¹²⁷⁵ especially if the seller has limited financial means, is located in a different jurisdiction than the ISP or in a jurisdiction without an efficient court system,¹²⁷⁶ and effective dispute resolution can enhance the platform's commercial reputation.

Most of the examples discussed in Chapter Three¹²⁷⁷ neatly illustrate the benefits and the limitations of contractually mandated dispute resolution clauses.

(c) The examples in Chapter Three

In Chapter Three¹²⁷⁸ six examples have been used to illustrate the cross-border nature of some internet disputes and the difficulties of redress where this is coupled with a power imbalance between the parties. These examples can now be used to illustrate the effectiveness of contractually mandated arbitration.

In Example One¹²⁷⁹, if the B2B e-commerce platform made online arbitration compulsory for all its members with the threat of expulsion for members who do not participate in online arbitration or who do not comply with an award, this would make redress more likely for the trader concerned.

In Example Two¹²⁸⁰ it is likely that the consumer would obtain a credit charge back. However if this is not available, then if the travel company had subscribed to a trust mark scheme providing for independent redress, the consumer would be more likely

¹²⁷⁵ See the discussion in 5-5 on the benefits of ODR/online arbitration

¹²⁷⁶ For a more detailed discussion of this topic see J Hörnle 'Internet Service Provider Liability- Let's Not Play Piggy in the Middle' (2002) 7(3) *Communications Law* 85-88, arguing that there should be a 'put back' provision combined with online arbitration.

¹²⁷⁷ 3-3

¹²⁷⁸ 3-3

¹²⁷⁹ A sole trader in Nigeria concludes a contract with a company, manufacturing locally in China and trading internationally, for some widgets through a B2B e-commerce trading platform. The widgets are defective and the sole trader seeks redress for breach of contract

¹²⁸⁰ A consumer in Chile enters into a contract with a large US travel company for a cruise holiday through an e-commerce website. However the cruise is cancelled at the last minute and the deposit of US \$2000 has not been refunded. The consumer seeks return of the deposit paid

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to obtain redress, but this pre-supposes that consumers are aware of trust marks and only contract with subscribing businesses in the first place.

Example Three¹²⁸¹ is an illustration for the proposition that online arbitration should be binding on the corporate entity in order to avoid the more powerful party electing to litigate in a local court before which the individual is not able to defend herself. The procedure of the UDRP should be made fairer and be binding on corporate entities.¹²⁸²

In Example Four¹²⁸³ the Egyptian individual could use online arbitration to obtain redress against the US news corporation if the online news platform had obliged all persons posting on the website to agree to online arbitration. Again this shows the importance of online operators binding users to online arbitration.

However, not all internet disputes can be covered by contractually mandated online arbitration, especially where there is not trusted third party involved. In Example Five¹²⁸⁴, the dispute is not covered by a contractually mandated online arbitration scheme, as the dispute does not arise from a platform, but from the content of a private individual's own website. There is no trusted third party in this case.

¹²⁸¹ The owner of a bricks and mortar shop located in Dublin has named her shop 'Crate & Barrel' and she also operates a website connected to her shop under the domain www.crateandbarrel.biz. A large US company running an extensive chain of store present in most states of the US claims infringement of their US Federal trade mark in the same name and commences infringement proceedings against the unincorporated Irish trader before a US District Court. The owner cannot afford litigation in the US and the US District Court enters default judgment in favour of the US corporation. The domain name is transferred to the US corporation

¹²⁸² See the discussion in 7-3

¹²⁸³ A US-based corporation publishes an online article on an interactive online news platform, accusing a named Egyptian civil servant of belonging to a terrorist organisation. The Egyptian individual seeks redress for defamation

¹²⁸⁴ A US citizen uploads potentially defamatory comments about an internationally famous Australian film star on his own website. These comments are copied and downloaded widely and thus propagated on a global basis. The film star commences proceedings against the US citizen before his local Australian court for defamation

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Likewise in Example Six¹²⁸⁵ since there is no trusted party there is no possibility for redress by online arbitration. These last two examples show the limitation of the contractually mandated solution.

For such disputes, something else is needed over and above contractually mandated online arbitration.

2.2 Compulsory, statutory arbitration

At first sight, the notion of compulsory online arbitration may appear to be an oxymoron- it has been pointed out above that arbitration is based on the *agreement* of the parties¹²⁸⁶, and this seems *prima facie* contradictory to the notion that arbitration is compulsory. However, it is possible to argue that the parties have *agreed* to arbitrate in a case where extra-judicial adjudication has been imposed by statute, for the purposes of classifying a form of dispute resolution as 'arbitration'.¹²⁸⁷ This argument is substantiated below.¹²⁸⁸

Clearly, as has already been discussed, compulsory extra-judicial adjudication has to comply with the fair trial principles under Article 6 ECHR, as the waiver doctrine does not apply.¹²⁸⁹ This require compliance with the due process standards discussed below.¹²⁹⁰

In the UK there are two statutory, compulsory and extrajudicial adjudication schemes which may serve as a model for a dispute resolution scheme for internet

¹²⁸⁵ A large Russian company illegally remotely hacks into the server of an English inventor in order to obtain confidential, sensitive information. The English inventor seeks redress for damages arising from this unlawful action.

¹²⁸⁶ 4-3.2

¹²⁸⁷ A Redfern, M Hunter fn 270 9 Fn 34: 'There are circumstances in which arbitration may be a compulsory method of resolving disputes, *eg* in domestic law, arbitrations may take place compulsorily under legislation governing agricultural disputes or labour relations.', J Tackaberry, A Marriott fn 674 2-010, 15 the authors point out in the legal definition of arbitration that 'sometimes the submission instead of being voluntary is imposed by statute.'

¹²⁸⁸ 8-2.2.3

¹²⁸⁹ See the discussion in 6-2.5

¹²⁹⁰ 8-3

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disputes: the ombudsman¹²⁹¹ schemes for communication disputes and for financial services.

2.2.1 Ombudsman schemes for communication disputes

Sections 52-54 of the Communications Act 2003¹²⁹² impose a duty on communications companies to subscribe to a dispute resolution scheme, providing redress and remedies to residential and small business customers¹²⁹³ complaining about the provision of electronic communications services such as complaints about billing, customer service, loss of service, equipment faults, misselling, privacy infringement or disconnection¹²⁹⁴. Two ombudsman/adjudication schemes have been approved to provide dispute resolution services: Otelo¹²⁹⁵ and CISAS¹²⁹⁶. Otelo and CISAS provide conciliation and adjudication services to complainants. Communications companies can choose which of these two schemes to subscribe to in order to fulfil their obligations under the conditions set under section 52 (2) (b) of the Communications Act. Once a communications company has become a member of either scheme, it has to participate in the dispute resolution, whereas customers are not obliged to use these schemes and are (at least in theory) free to go to court instead.

¹²⁹¹ Ombudsman schemes in the UK traditionally were set up to investigate maladministration, *ie* disputes between the state administration and individual citizens, and many ombudsman schemes still perform this function, such as the Local Government Ombudsman or the Parliamentary and Health Service Ombudsman or the Prisons and Probation Ombudsman, such schemes are outside the scope of the thesis, which only looks at the resolution of disputes between *private* parties, see R Nobles 'Keeping Ombudsmen in their Place' [2001] *Public Law* 308-328, 309-310; In recent, modern ombudsman schemes, emphasis has moved away from investigation and report writing to dispute resolution, so that this new generation of ombudsman schemes are making binding decisions on the merits, P Morris, R James 'The Financial Ombudsman Service' [2002] *Public Law* 640-648, 640

¹²⁹² As required by Article 8 (4) (b) of the Framework Directive 2002/21/EC of 7. March 2002 and Article 34 (1) of the Universal Service Directive 2002/22/EC of 7. March 2002

¹²⁹³ Section 52 (2) (b)- a small business customer is defined as having less than ten employees. see s. 25 (6) (b)

¹²⁹⁴ See the Otelo Annual Report 2006, Figure 4 on p. 17; CISAS Annual Report 2006 on p.9

¹²⁹⁵ Office of the Telecommunications Ombudsman, a company limited by guarantee

¹²⁹⁶ Communication and Internet Services Adjudication Scheme, operated by IDRS Ltd, a division of the Chartered Institute of Arbitrators

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Furthermore, once the adjudicator has reached a final decision, the customer has a choice whether or not to accept it.¹²⁹⁷ If the customer accepts, the decision becomes binding on the company,¹²⁹⁸ if the customer does not accept the decision, it will lapse.¹²⁹⁹ The maximum award under these schemes is £ 5,000.¹³⁰⁰ However under the OTELO scheme awards have been small, 74% of complainants received less than £100.¹³⁰¹ Most awards under the CISAS scheme have been in the bracket of £100-£500 and the average award was £174.¹³⁰² If a communications company persistently refused to comply with awards, this would amount to a breach of their membership conditions and could lead to expulsion from the dispute resolution scheme and could ultimately trigger the enforcement provisions¹³⁰³ in the Communications Act 2003.¹³⁰⁴

2.2.2 Financial Ombudsman Service

The Financial Ombudsman Service considers complaints from consumers or businesses with an annual turnover of less than one million pounds¹³⁰⁵ about financial services¹³⁰⁶, consumer credit¹³⁰⁷, banking and insurance. The maximum award the FOS can make is £100,000.¹³⁰⁸ Since the Consumer Credit Act 2006 has come into force in April 2007 its jurisdiction covers 26,000 regulated firms and up

¹²⁹⁷ This distinguishes these ombudsman/adjudication schemes from arbitration. However under the scheme proposed under the Model in this thesis, the decision of the ombudsman would be binding on both parties

¹²⁹⁸ Otelo Terms of Reference. 9.12; the Otelo Annual Report 2006 states that only 47 remedies of 8500 (0.55%) in the period 2003-2006 have not been complied with; CISAS Rule 4 (l)

¹²⁹⁹ Section 52 (2) (b) Communications Act 2003 and Otelo Terms of Reference 7.1, 9.9, 9.10, 9.11, 9.12 and 13 (a) and (b); CISAS Rule 2 (e)

¹³⁰⁰ Otelo Terms of Reference 9.3 (c); CISAS Rule 2 (i)

¹³⁰¹ Otelo Annual Report 2006, p.6

¹³⁰² CISAS Annual Report 2006, pp. 7 and 10

¹³⁰³ Sections 94 et sequi

¹³⁰⁴ As has been confirmed by Gregory Hunt, Director of Business Development for the organisation, IDRS running the CISAS scheme (email of 5/9/2007 on file with author)

¹³⁰⁵ Financial Services Handbook, Rules 2.4.3, 2.4.4

¹³⁰⁶ Compulsory jurisdiction covers all regulated firms. see Financial Services and Markets Act 2000, ss. 225 et sequi

¹³⁰⁷ Compulsory jurisdiction, see Consumer Credit Act 2006 ss. 59 et sequi: only individuals and partnerships consisting of no more than three partners can use the procedure to complain about consumer credit.

¹³⁰⁸ Financial Services Handbook, Rule 3.9.5

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to 100,000 firms that have consumer credit licences issued by the OFT.¹³⁰⁹ A complaint made to the FOS does not have to be determined according to the law only, the ombudsman may decide a complaint by reference to what in his opinion is fair and reasonable in all the circumstances.¹³¹⁰ The FOS initially issues an informal recommendation to the parties, if the parties do not accept the recommendation, an ombudsman will review the case and issue a Final Decision¹³¹¹. This Final Decision only becomes binding if the complaining consumer notifies the FOS that he or she has accepted the Decision.¹³¹² A Decision accepted in this way can be directly enforced by the complainant as a court order (just like an arbitration award would be).¹³¹³

2.2.3 Classification of compulsory arbitration/ ombudsman services as arbitration

For cross-border disputes the question will also be whether a statutory ombudsman decision is an award, enforceable under the New York Convention. In this context it has to be examined whether a compulsory, statutory ombudsman scheme counts or should count as arbitration.¹³¹⁴

(a) The position under English law

In England, section 94 (1) expressly provides that the substantive part (Part I) of the Arbitration Act applies (with modifications¹³¹⁵) to statutory arbitration. Section 95

¹³⁰⁹ See Annual Report 2005/2006, pp. 3, 9, 10; P Morris, R James fn 1291 641 have described this huge institution and resulting bureaucracy as a 'brave new world in ombudsmanry'.

¹³¹⁰ See section 228 (2) FSMA 2000 and *R (on the application of IFG Financial Services Ltd) v Financial Ombudsman Service Ltd* [2005] EWHC 1153 (Admin) para. 13

¹³¹¹ A Final Decision is only issued in about 8% of all cases, see Annual Report 2005/2006, p.36

¹³¹² Section 228 (5) FSMA 2000

¹³¹³ Sections 229 (8) and (9) and Part III Schedule 17 FSMA 2000

¹³¹⁴ Under the Model proposed here, unlike the adjudication schemes discussed above in 8-2.2.1 and 8-2.2.2, the decision would be binding on both parties. Gregory Hunt of IDRS Ltd operating the CISAS adjudication scheme points out that CISAS is not arbitration for the reason that it is not binding on the consumer or small customer (email of 5/9/2007 on file with author). This would be different under the Model.

¹³¹⁵ See Sections 95-98

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(1) (a) creates a legal fiction by implying that the parties have concluded an arbitration agreement. Therefore, if the ombudsman service is based on statute, the Arbitration Act 1996, including its enforcement provisions applies.

In England there is no inherent contradiction between compulsory arbitration and agreement. An example of this is the recent Court of Appeal case of *Stretford v Football Association*¹³¹⁶. In this case, even though the arbitration clause was imposed on all players' agents by the sports regulatory body (the Football Association) in the compulsory licence, the court found that the dispute resolution was voluntary arbitration.¹³¹⁷ The Court of Appeal held that the arbitration procedure was imbued with sufficient due process to comply with Article 6 of the ECHR.¹³¹⁸ Even though the agent had no choice but to enter into the licence agreement with the (self-) regulatory body and it could therefore be described as compulsory (the Court of Appeal avoiding this term), the Court of Appeal said that this was a voluntary agreement to submit the dispute to arbitration and therefore the Arbitration Act applied.¹³¹⁹

In a much earlier case of 1874, the House of Lords held that a contractual obligation of the parties to refer a dispute to arbitration is compulsory if it was based on statute.¹³²⁰ In that case the parties were bound to refer the dispute to arbitration because of the statutory underpinning of the arbitration agreement. Hence there is no inherent contradiction in saying that arbitration is based on an agreement and statute simultaneously.

¹³¹⁶ *Stretford v Football Association* [2007] AllER (D) 346 (Mar) (CA), Judgment of 21. March 2007

¹³¹⁷ Para 49

¹³¹⁸ Para 65

¹³¹⁹ Para 49

¹³²⁰ *Caledonian Railway Company v Greenock and Wemyss Bay Railway Company* (1870-1875) LR 2 Sc 347 (HL) Judgment of 24. March 1874

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Under English law, an extra-judicial adjudication scheme, which is imposed by statute, *but at the same time* based on an agreement, may qualify as arbitration, regardless of the name given to the scheme or its statutory basis.¹³²¹

For example, the companies under the communications adjudication schemes are agreeing to the adjudication in their membership agreement and they can choose which scheme to become a member of. In fact, also for the financial services ombudsman scheme discussed above, it could be argued that the membership of the companies in the ombudsman scheme constitutes their agreement. In this sense the adjudication in these schemes could be classified as arbitration as it is based on a membership agreement.¹³²² On the other hand, since the decisions are not binding on the 'weaker' party, these adjudication schemes may not constitute arbitration for this reason.¹³²³

If the ombudsman scheme is based on statute, the Arbitration Act 1996 will apply in England because of section 94 (1). The position under English law can be summarized by the following table:

	Ombudsman scheme imposed by statute/statutory instrument	Arbitration imposed by self-regulatory body, not on statutory basis
Recognition and enforcement under the New York Convention, Articles II and V (1) (a)	Agreement required	Agreement required
Applicability of Arbitration Act 1996	Section 94 (1)	Agreement required <i>Stretford case</i>

¹³²¹ Provided it involves binding dispute resolution as described in 4-3.2

¹³²² And because of s. 94 (1) of the Arbitration Act 1996

¹³²³ This is unclear. However the issue need not be decided here, as for the Model proposed, online arbitration awards would be *binding* on *both* parties

(b) Enforcement under the New York Convention

The question whether an award resulting from a compulsory scheme, which is also based on agreement, is enforceable in a foreign jurisdiction under the New York Convention under Article III, depends on whether the law applicable to the arbitration agreement¹³²⁴ recognizes it as such. One of the factors which may make an award unenforceable is the lack of consent.¹³²⁵ Whether sufficient consent exists will be determined by the applicable law¹³²⁶ and depends on all the circumstances¹³²⁷. Furthermore, the conclusion as to whether compulsory arbitration can be based on agreement will ultimately vary between national laws¹³²⁸. However there are precedents in sports arbitration which suggests that it can.¹³²⁹ Furthermore, it is unclear from the drafting history of the New York Convention whether or not it was intended to apply to compulsory arbitration.¹³³⁰ Therefore there is no clear cut answer and much will depend on the applicable law.

¹³²⁴ 4-4.1

¹³²⁵ Articles II (1) and Article V (1) (a) NYC; A van den Berg *The New York Arbitration Convention of 1958* (Kluwer Deventer 1981) 287-288

¹³²⁶ Article V (1) (a) NYC

¹³²⁷ An example for quasi-compulsory arbitration is the US-Iran Claims Tribunal. This has been set up by Treaty between the US and Iran (Algiers Accord). Individuals bringing claims before the Tribunal are, of course not a party to this Treaty. However, the Court of Appeal of Paris, on 28. June 2001 has held that an individual bringing a claim before the Tribunal agrees to arbitration at that point, (2002) XXVII Yearbook Commercial Arbitration 439 para 14, by contrast, the English High Court has found otherwise (under Dutch law) in *Dallal v Bank Mellat* (1986) XI Yearbook Commercial Arbitration 547, para 2 (but even though there was no agreement, the Court found the Tribunal to be competent and therefore found *res judicata* and struck out the English proceedings as vexatious, para 15)

¹³²⁸ In some jurisdictions compulsory or mandatory arbitration may be regarded as unconstitutional and an infringement of the right to a fair trial. see, for example the Decision of the Italian Corte Costituzionale of 8. June 2005, where it held that a statutory provision providing for mandatory arbitration for waterworks disputes is unconstitutional, see Kluwer Arbitration Reports available from

<http://www.kluwerarbitration.com/arbitration/arb/home/ipn/default.asp?ipn=80640> [14. September 2007]

¹³²⁹ See for example *Slaney v IAAF*, where the US Court of Appeals (7th Circuit). 27. March 2001 has recognised an award made by compulsory sports arbitration as *res judicata*, and did not recognize the defence that there was no written submission agreement (2001) XXVI Yearbook Commercial Arbitration 1091, paras 8-12

¹³³⁰ A van den Berg fn 1325 380: Article I (2) states that the Convention applies to arbitral awards made by permanent bodies to which the parties have submitted- the adverb 'voluntarily' was dropped before 'submitted'- this seems to suggest that compulsory arbitration is covered by the Convention.

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(c) An argument for classifying compulsory arbitration based on agreement as arbitration under the New York Convention

Both, traditional arbitration and ombudsmen services constitute adjudication by a private party, outside the ordinary courts.¹³³¹ They play a similar role, *ie* the resolution of a dispute between two private parties with a final decision imposed by a third party adjudicator outside the courts, which has *res judicata* effect.¹³³²

Ultimately the question whether a particular¹³³³ adjudication scheme could be described as arbitration depends on whether the parties have agreed to it (in which case it may be arbitration) or whether it has been imposed by statute or a regulator *in such a way* that it cannot be said that there is an arbitration agreement (in which case there is no arbitration). It is argued here that if arbitration is imposed by a regulator, the process should nevertheless qualify as arbitration.¹³³⁴ The argument here is that arbitration can be compulsory *and* be based on agreement at the same time. There is no inherent contradiction in the notion of compulsory arbitration based on agreement.

Hence arbitration and the ombudsmen schemes described above share many similar features and the discussion of fairness standards and how to implement them is equally relevant to ombudsman schemes and arbitration. Therefore if an

¹³³¹ R James *Private Ombudsmen and Public Law* (Ashgate Aldershot 1997) 3: 'An ombudsman is an independent person who can receive complaints, investigate them and direct or recommend a remedy where the complaint is found to be justified'.

¹³³² If the rules of the ombudsman scheme provide for finality (as is the case of the schemes reviewed above, once the customer has agreed to it): *R (on the application of Towry Law Financial Services Plc) v Financial Ombudsman Service Ltd* [2002] EWHC 1603 (Admin) para. 17 and *Westminster City Council v Haywood and another (No2)* [2000] ICR 827 (ChD) 840 (*res judicata* effect of statutory ombudsman schemes) and *R (Bradley and Others) v Secretary of State for Work and Pensions* The Times, 27. February 2007 (finding of ombudsman binding on Minister, if it complied with due process)

¹³³³ There is no general blueprint for ombudsmen schemes, each has to be evaluated according to its own rules and terms of reference, R James fn 1331 2-3

¹³³⁴ See for example the Malmö Taxi Association case discussed in Chapter 6-2.5 (e) where in order to provide a taxi service, a driver had to obtain a license from the MTA and this contained an arbitration clause. Even though the adjudication was imposed in this way it was still considered to be voluntary arbitration; the same argument is made by J McLaughlin in respect of the US in 'Arbitrability: Current Trends in the United States' 12 (2) *Arbitration International* 113-136, 134

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ombudsman scheme is based on an agreement¹³³⁵, it *should* amount to arbitration and the New York Convention should apply for enforcement purposes in foreign jurisdictions.¹³³⁶

2.2.4 Compulsory adjudication/an ombudsman scheme for internet disputes

The reason why statutory ombudsman schemes imposing compulsory arbitration have been discussed here is that they compel the ‘stronger’ party to submit to arbitration and therefore show an example of how the ‘stronger’ party can be brought before the adjudicator.

An ombudsman scheme for internet disputes would effectively solve the Catch-22 situation described above while still avoiding the complexity, delay and cost involved in litigation. An ombudsman scheme would be intermediary dispute resolution mechanism, where non-statutory online arbitration is not available, in accordance with the proportionate model advocated in Chapter Seven¹³³⁷.

In his Preliminary Report ‘Access to Justice’ Lord Woolf recommended that the government should consider creating more ombudsmen schemes for consumer complaints.¹³³⁸

An ombudsman scheme for internet disputes would be necessary in a situation where there is a dispute between an individual and a corporate entity and where there is no contractually mandated arbitration scheme applicable to the dispute. This would ensure access to fair dispute resolution (second principle of fairness¹³³⁹).

¹³³⁵ And if the ombudsman’s decisions are binding

¹³³⁶ However the courts in different jurisdictions may take different views on this, see fn 1328

¹³³⁷ 7-4

¹³³⁸ Para 16

¹³³⁹ 2-2.3.1

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The Model outlined here would include an internet disputes ombudsman office created by legislation as one piece of the jigsaw puzzle of the Model.¹³⁴⁰ Such an internet disputes ombudsman office could not be created without legislative backing, as there is no single discernible self-regulatory body or even industry sector which could take the initiative and bind the parties into arbitration agreements.

The need for such an ombudsman scheme arises from the power imbalance described in Chapter Two, the jurisdictional issues discussed in Chapter Three and the inadequacy of arbitration as a form of dispute resolution for internet disputes discussed in Chapters Seven and Eight. It would provide for a fair dispute resolution mechanism, thereby enhancing trust and confidence in the internet as a communications medium and in e-commerce generally and it would overcome the difficulties of bringing both parties to the adjudicator. It would make dispute resolution accessible (second principle of fairness) and provide a counterpoise (third principle of fairness¹³⁴¹) where the parties are of unequal bargaining power.

The scheme should be based on the agreement of both parties, so that the scheme is a form of online arbitration which would fall under the regime of the New York Convention. This would ensure that the decisions are awards which can be enforced in a foreign jurisdiction under the New York Convention.¹³⁴² It has already been argued above that a statutory, compulsory arbitration scheme can be based on agreement of the parties.¹³⁴³ How this would work will be further discussed below.¹³⁴⁴

¹³⁴⁰ The Model is fully outlined, below 8-6

¹³⁴¹ 2-2.3.2

¹³⁴² See the discussion in 6-2.5

¹³⁴³ 8-2.2.3

¹³⁴⁴ 8-6

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The scheme should be funded by a mixture of a fee imposed on the parties and a state subsidy from general taxation, which is required to make the scheme accessible. The issue of costs and funding is further discussed below.¹³⁴⁵

The next section will outline the due process (first principle of fairness¹³⁴⁶) standards which any online arbitration and ombudsman scheme should comply with.

3. Standards for Online Arbitration of Internet Disputes- Findings from Previous Chapters

This section compiles the due process standards which *should* apply to online arbitration and any ombudsman scheme, by extrapolating the findings made from the discussion of applicable law in Chapter Four, due process in arbitration in Chapter Six and consumer arbitration and the UDRP as examples of non-consensual forms of arbitration in Chapter Seven.

3.1 Applying the ‘weaker’ party’s mandatory laws

In Chapter Four it has been argued that, for cross-border internet disputes, the mandatory laws of the ‘weaker’ party (such as a consumer, or an insured) should be applied, if the corporate entity directed its activities to that party’s jurisdiction, unless the ‘weaker’ party has misled the corporate entity as to his or her location.¹³⁴⁷ If mandatory laws did not apply this would seriously undermine the effectiveness of laws designed to protect the weaker party in a situation of power imbalance.¹³⁴⁸

¹³⁴⁵ 8-5

¹³⁴⁶ 2-4

¹³⁴⁷ 4-4.5.4

¹³⁴⁸ 4- 4.5 and in relation to consumer protection. Chapter 7-2.4.5

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3.2 Independence and impartiality of the provider and the arbitrators

Independence and impartiality have been generally discussed in great detail in Chapters Seven¹³⁴⁹ and Eight¹³⁵⁰. In this context a distinction must be made between independence of the institution and that of the arbitrators.

3.2.1 Independence and impartiality of the arbitrators

The first point here is that the arbitrator should be impartial, and have no conflicts of interest¹³⁵¹. The arbitrator should be under a duty to disclose a CV and any relevant interests.¹³⁵² A relevant interest would be an interest of the arbitrator or of a person closely affiliated to the arbitrator¹³⁵³ such as a business, professional, financial or personal relationship with one of the parties (or someone affiliated to a party or its representative) or any interest in the subject-matter or outcome of the dispute.¹³⁵⁴

However, this is not sufficient. In addition the procedure should allow each party to *challenge* an appointment of an arbitrator on the basis of lack of independence or partiality and the same standard as that observed by a court of law should apply. Such a challenge could take place before a specialist appeal panel.¹³⁵⁵

A more difficult issue is to address systemic bias. As far as the independence of the arbitrators themselves are concerned, arbitrators should be chosen from a variety of stakeholder groups (*ie* not only those representing trade mark interests for IP disputes, or not only those representing consumer interests for consumer disputes

¹³⁴⁹ 6-3

¹³⁵⁰ 7-2.4, 7-3.2.1

¹³⁵¹ With a duty to recuse himself or herself if there is a conflict of interest

¹³⁵² AAA Due Process Protocol for Consumers Principle 3 (e)

¹³⁵³ Such as a spouse, relative or business partner

¹³⁵⁴ ABA Guidelines, Principle VI A (3) (a), (b)

¹³⁵⁵ On the unavailability of such a challenge under the UDRP, 7-3.2.6 and see also the discussion in 6-3.2 on the lower standards of independence applied to commercial arbitrators: AAA Due Process Protocol for Consumers Principle 3 (e)

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etc).¹³⁵⁶ Furthermore it would be preferable if the arbitrators' income is not dependant on the number of appointments, as again there is a risk of a repeat player effect, if only one party refers cases for arbitration.¹³⁵⁷ Hence if arbitrators are paid a regular (part-time or full-time) salary (such as adjudicators working for an ombudsman scheme) they are less likely to be influenced by the prospect of repeat business. Furthermore the adjudicators should have sufficient independence from the provider.¹³⁵⁸ If possible, the allocation of arbitrators to a particular case should be random, after certain practical considerations (such as technical expertise, language capability, neutral nationality and availability) have been taken care of.¹³⁵⁹ If both parties can influence the appointment of the arbitrator(s) this would improve independence, albeit that the dominant repeat player is at an advantage, knowing the arbitrators better than the one-shot player. Hence random allocation is preferable for ensuring independence.

3.2.2 Independence of the institution

Clearly the institution should be independent of both parties.¹³⁶⁰ As with the arbitrators themselves, the institution should also be under an obligation to disclose any financial or institutional relationship with either party.¹³⁶¹

¹³⁵⁶ 6-3.2.6, 7-2.4.1, 7-3.2.1 (c)

¹³⁵⁷ 3-5.2.6-3.2.4

¹³⁵⁸ For example where an ombudsman scheme is financed by membership fees the ombudsman will know which members have paid their subscription and from this an allegation of partiality may arise. By contrast adjudicators independent from the provider may not have this information. This was pointed out by Gregory Hunt in relation to the CISAS scheme (see email of 5/9/2007 on file with author).

¹³⁵⁹ Discussion of the UDRP, 7-3.2.1 (d)

¹³⁶⁰ Dispute Resolution by a trade or consumer association is not fully independent and therefore contrary to this principle, however cf both EC Recommendation 98/257/EC, Principle I and II and the ABA Guidelines Principle VI A, which both settle for lower standards (the arbitrator must not have been employed by the association in the last three years before appointment and full disclosure). For a detailed examination of trade associations' complaints procedures and a conclusion that they are ineffective, see D Greenberg, H Stanton 'Business Groups, Consumer Problems: The Contradiction of Trade Association Complaint Handling' Chapter 5 in L Nader (ed) *No Access to Law* (Academic Press New York 1980) 193-231, 225-227; see also the Condition 4d Consumer Code Approval Scheme, Core Criteria and Guidance dated November 2006, OFT 390

¹³⁶¹ Such as a trader being paid a commission for referring cases to the dispute resolution provider, see the ABA Guidelines, Principle VI A (1) and (2)

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If one party sets up and pays for the procedure and/or sets up the arbitration scheme, this creates a risk of systemic bias.¹³⁶² This risk arises, for example where a trade or industry association (or a consumer association for that matter) sets up a self-regulatory dispute resolution scheme for disputes between its members and consumers (business).

This issue could be mitigated through the institutional organization of the provider. All competing stakeholder interests should be represented on the body designing the scheme and the governing or oversight body of the dispute resolution provider. Furthermore, the entire membership of the executive of the redress scheme should be independent of any trade association or other body promoting the redress scheme.

The service should be funded in such a way as to prevent real or perceived bias.¹³⁶³ Clearly, if online arbitration or an ombudsman scheme is funded by general taxation, no independence issue would arise. Considering that state courts are also subsidized, public funds should be used to subsidize online arbitration for internet disputes and in particular to fund some of the costs of setting up such schemes.

The two ombudsman schemes in the financial services and communications sector described above¹³⁶⁴ have been funded by industry through an annual levy and a case fee.¹³⁶⁵ Since the respective regulators¹³⁶⁶ have controlled and approved the procedural rules, supervise the operation of the schemes, their independence has not been tainted by the fact that the dispute resolution is paid for by industry. Therefore, it should be considered whether a regulator, such as the OFT or OFCOM should set up an online arbitration or ombudsman scheme for internet disputes, as this would

¹³⁶² 6-3.2 and 7-2.4

¹³⁶³ Consumers International fn 432 16; Condition 4d of the Consumer Code Approval Scheme. Core Criteria and Guidance dated November 2006, OFT 390

¹³⁶⁴ 8-2.2.1, 8-2.2.2

¹³⁶⁵ See Otelo Terms of Reference, Article 12; Rule 6 (a) CISAS Rules: Financial Ombudsman Service. Annual Report 2005/2006, p. 42

¹³⁶⁶ Ofcom and the Financial Services Authority respectively

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avoid the conflict between funding coming from industry and independence of the scheme.

However it should be pointed out here that funding cannot come from industry in the form of a regular levy, as there is no clearly identifiable, regulated sector.¹³⁶⁷ Ideally, the procedure should be financed by public funds.¹³⁶⁸ This is the case for the Austrian Internet Ombudsman.¹³⁶⁹

Furthermore, if only one party selects the dispute resolution service provider, this also creates a risk of systemic bias, as has been explained in Chapter Seven.¹³⁷⁰ The problem is completely avoided if there is only one institution providing online arbitration for particular types of disputes, as competition between different institutions may taint their independence, competing to appear friendly to the party selecting their services.¹³⁷¹ If there is more than one institution this problem could be avoided if cases are allocated to a provider either randomly or through a third party. Alternatively the problem could be alleviated¹³⁷² by ensuring that the procedural rules are the same for all providers, so that they only compete on cost.

3.3 Fair hearing

The principle of fair hearing requires that each party is given an opportunity to present his or her case and respond to the case of the other. Hence each party must be given an opportunity to advance legal argument and factual evidence and be shown, and given an opportunity to react to the legal argument and evidence of the other party.¹³⁷³

¹³⁶⁷ Discussion 8-5

¹³⁶⁸ 8-5

¹³⁶⁹ Description 5-3.2

¹³⁷⁰ 7-3.2.1

¹³⁷¹ UDRP discussed above in 7-3.2.1

¹³⁷² But not completely avoided, as the competition may still influence the decision-making

¹³⁷³ See 6-4, 7-2.4, 7-3.2.3; see also Principle III of EC Recommendation 98/257/EC: Condition 4d Consumer Code Approval Scheme. Core Criteria and Guidance dated November 2006. OFT 390

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Several requirements flow from this principle. Very tight and inflexible word limits or deadlines for filing submissions might infringe a party's right to present his or her case.¹³⁷⁴ An example of this has been discussed in Chapter Seven in relation to the UDRP, where the respondent has less than three weeks for filing a Response to the Complaint.¹³⁷⁵ Furthermore, a strict limit on the number of submissions by the parties, such as categorically disallowing a Reply to Response, may also be an infringement of the principle of fair hearing.¹³⁷⁶ Similarly, while an oral hearing is not always required, in some complex cases or cases requiring the evaluation of evidence an oral hearing (possibly conducted using online technology such as web-conferencing) may be appropriate and this should be left to the discretion of the arbitrator.¹³⁷⁷

In the international context, language barriers may deprive one party from obtaining a fair hearing. For this reason it is important that procedural rules contain sensible stipulations about the language of the proceedings and translation.¹³⁷⁸

It is important for an arbitration or ombudsman procedure used between parties subject to a power imbalance that the 'powerful' party is not given more influence in designing the procedural rules as an effect of the repeat player situation. In other words the procedural questions should be decided either by the arbitrator in the case or, *ex ante*, for all disputes, by all stakeholders involved.¹³⁷⁹

In situations where the individual is likely to be unrepresented, and therefore unable to present a case, an inquisitorial procedure, where the arbitrator takes the initiative in investigating and researching the evidence and law may be more suitable than the

¹³⁷⁴ 7-3.2.3, Consumers International fn 432 19

¹³⁷⁵ 7-3.2.3 (e)

¹³⁷⁶ Discussed in relation to the UDRP 7-3.2.3 (c)

¹³⁷⁷ Discussion of the UDRP in 7-3; and AAA Due Process Protocol for Consumers Principle 12 (a); see also H Perritt fn 432 680

¹³⁷⁸ See the discussion of the language issue in the context of the UDRP in 7-3.2.4; Consumers International fn 432 18

¹³⁷⁹ See further the discussion of consumer arbitration in 8.2

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‘pure’ adversarial approach in order to reduce the need for costly legal representation.¹³⁸⁰

3.4 Reasons for decisions & transparency

Arbitrators should hand-down reasoned decisions.¹³⁸¹ This standard that decisions should be published would be a departure from the traditional confidentiality of arbitration awards and is likely to be resisted by corporate entities who wish awards to remain confidential.

Like the UDRP, any online arbitration procedure should be fully transparent. This does not only mean that information about the procedure, the rules, its terms of reference, costs, the arbitrators’ details and CV, the procedure for selection and allocation of arbitrators should be accessible online, but that the reasoned decisions should also be published online and the principle of confidentiality should not apply.¹³⁸²

3.5 Judicial review/appeal

In order to allow for the correction of serious irregularities in the procedure (such as a challenge to the arbitrator’s independence) and of mistakes of law and in order to reduce the inconsistency of decisions, there should be a possibility of appeal to a

¹³⁸⁰ See 6-4 and the discussion of the Model below in 8-6.3.4; see also Principle IV of the EC Recommendation 98/257/EC and Condition 4d Consumer Code Approval Scheme, Core Criteria and Guidance dated November 2006, OFT 390; see also G Richardson, H Genn fn 50 132 and R James fn 1331 3; OECD Recommendation on Consumer Dispute Resolution and Redress, July 2007, Recommendation II A 3 recognising the need for accessible procedures avoiding the need for legal representation

¹³⁸¹ See the explanation of the importance of reasons in 6-5 and in the context of consumer arbitration in 7-2.4.4; see also Condition 4d Consumer Code Approval Scheme, Core Criteria and Guidance dated November 2006, OFT 390; AAA Due Process Protocol for Consumers Principle 15 (c) and Consumers International fn 432 19

¹³⁸² The case for transparency has been made in Chapter 6-6 but see also the discussion in Chapter 7 in relation to consumer disputes 7-2.4.3 and the UDRP 7-3.2.8; H Perritt fn 432 682; Consumers International fn 432 17; BEUC Position Paper ‘Alternative Dispute Resolution’ of 21. November 2002 BEUC X/048 2002, p. 10. Cf the Austrian Internet Ombudsmann keeps its rulings confidential, see <http://www.ombudsmann.at/ombudsmann.php/cat/21:title/H%E4ufige+Fragen> [14. September 2007]

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superior body.¹³⁸³ This superior body could be a panel of three or five senior arbitrators. However because of the potential inherent in an appeal system to increase cost and delay and hence its risk of reducing access to justice, appeals should be strictly limited by a leave requirement and a requirement for the appellant to pay (at least some of) the costs of an appeal. Appeals should only be allowed on important points of law or for procedural challenges.¹³⁸⁴

Having discussed the fairness standards which should apply to online arbitration, some thought should be given to how these standards can be implemented.

4. Implementation of the Standards

As has been seen in Chapter Six, traditional arbitration is based on the principle of party autonomy. This principle does not work well where the parties are subject to a considerable power imbalance, as here it is likely that the 'stronger' party will seek to determine the rules to the disadvantage of the 'weaker' party, especially if the 'stronger' party is a repeat player. Therefore it is important that the fairness standards outlined above are incorporated into procedural rules. This can be done in four ways: through the institutional rules, national framework legislation, an international convention and a referral system, each of which will be discussed in turn.

4.1 Institutional rules

Arbitration organizations may find that internet disputes, or certain types of internet disputes, require different sets of procedural rules than those used in commercial arbitration and therefore formulate separate rules for particular types of disputes. First tentative steps in this direction have been made.

¹³⁸³ 6-7 and 7-3.2.6

¹³⁸⁴ See the discussion in Chapter 6-7

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For example, the American Arbitration Association formulated special rules for consumer disputes in 2005.¹³⁸⁵ These Rules amended the rules for commercial arbitration and provided, for example that consumers could still go to a small claims court¹³⁸⁶ and provided for a low cost fee schedule for consumers¹³⁸⁷. The AAA has also formulated the principles which are to govern its consumer arbitrations in its Consumer Due Process Protocol. The Protocol was drawn up by the AAA's National Consumer Disputes Advisory Committee, whose aim was to draw up principles reflecting broad consensus on standards for consumer arbitration, hoping that this will inform consumer rules generally and ultimately legislation and judicial opinions. Likewise the Chartered Institute of Arbitrators also provides a dedicated set of rules for consumer arbitration/adjudication.¹³⁸⁸

The argument of this thesis is that for the internet disputes under consideration, special institutional rules should be drawn up. Institutional rules are important for the development of arbitration law and are therefore important for the development of fairness standards.

However, a general awareness that arbitration between parties subject to a power imbalance may need special rules to deal with fairness issues¹³⁸⁹ is only beginning to develop and these efforts are largely confined to the B2C power imbalance. Therefore the second option, national framework legislation, dealing specifically with internet disputes is required.

¹³⁸⁵ See Consumer- Related Disputes Supplementary Procedures of 15. September 2005, replacing the rules of 1. July 2003, available from <http://www.adr.org/sp.asp?id=22014> [14. September 2007]

¹³⁸⁶ Rule C-1 (d)

¹³⁸⁷ Rule C-8: if the claim does not exceed \$ 10,000, the consumer is responsible for fees not exceeding \$125; if the claim is between \$ 10,000 and \$ 75,000 the maximum fee the consumer will be charged is \$375

¹³⁸⁸ Independent Consumer Arbitration Service (ICAS), rules available from http://www.idrs.ltd.uk/Consumer/PDF/ICAS_Rules_Application.pdf [14. September 2007-for lack of space not further considered]

¹³⁸⁹ And other issues such as affordability

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4.2 National legislation

National legislation should set a framework amending the general legislation on arbitration for internet dispute between a company and individuals in order to incorporate the minimum fairness standards discussed above. A party should be able to challenge an award if these standards have not been met. For example, tentative steps in this direction have been made by the Californian Code of Civil Procedure containing specific due process standards for consumer arbitration concerning the independence of the arbitrators and of the arbitration institution and disclosure requirements.¹³⁹⁰ The due process standards outlined above may serve as a blueprint to draft a model law setting out the standards which could be provided in national framework legislation for internet disputes.

4.3 An international convention on enforcement of awards

It has been mentioned in 3-9, that the jurisdictional rules and the rules on enforcement of court judgments pose real and substantial barriers to the resolution of internet disputes. By contrast, the New York Convention has facilitated the recognition and enforcement of foreign awards by committing Contracting States to recognizing and enforcing foreign arbitral awards and by limiting the grounds on which recognition and enforcement can be refused to international public policy.¹³⁹¹

However as has been discussed in Chapter Seven, certain types of disputes where the parties are subject to a power imbalance, such as consumer disputes are either not arbitrable, or the recognition or enforcement of the award may be against public policy.¹³⁹² Furthermore some states have limited the application of the New York Convention to commercial relationships, as defined under the law of that state.¹³⁹³

¹³⁹⁰ Sections 1281.92-96: no systematic, comparative research of all US federal and states' arbitration legislation has been undertaken- the Californian Code is only mentioned as an example.

¹³⁹¹ The reader is referred to 6-2.5 and 7.7

¹³⁹² 7-2

¹³⁹³ Article 1 (3) 2nd Sentence; 45 (out of 142) states, including the US have made such a declaration according to the author's count on the UNICTRAL website on 25. March 2007

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Furthermore, for an ombudsman scheme on statutory footing, in some jurisdictions, a court may refuse recognition and enforcement on the basis that an ombudsman decision is not an award.¹³⁹⁴

Hence the political incentive for negotiating a convention is that it would make online arbitration (including ombudsman schemes) of a variety of internet disputes enforceable across international borders. If this is not practical on an international level, an attempt should at least be made on a regional level, such as the EU.

The notion of internet disputes as defined in this thesis is wider than consumer disputes¹³⁹⁵, and therefore it may be helpful to have a separate convention on internet disputes. Such a convention should stipulate that provided the minimum due process standards as defined above have been applied, the award is to be recognized and enforced in the states having ratified the convention. This would enable the cross-border recognition and enforcement of awards relating to internet disputes, thus enabling cross-border internet transactions and interactions and it would help to incorporate the due process standards into arbitral procedure for internet disputes.

4.4 Referral systems/clearing house

In the system developed by *Lawrence Lessig* four modalities of regulation govern human behaviour: law, non-legal norms, markets and architecture.¹³⁹⁶ Law and norms have been discussed immediately above and the findings are that, at present, there are few specific norms to address the particular problems posed by internet dispute resolution. It has been argued in some quarters¹³⁹⁷ that the market will be

¹³⁹⁴ In this thesis the view is taken that they are arbitration awards, provided the submission to the ombudsman is based on the parties' agreement, see the discussion above, but see for example fn 1328

¹³⁹⁵ Definition of relevant disputes in 3-6

¹³⁹⁶ L Lessig 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harvard Law Review* 501-549, 507; L Lessig fn 1222 88-92

¹³⁹⁷ See for example H Perritt fn 432 700; and subject to proper disclosure about ODR/ADR, see L Ponte 'Broadening Traditional ADR Notions of Disclosure' (2002) 17 *Ohio State Journal on Dispute Resolution* 321-337, 337

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sufficient to regulate standards for online arbitration of internet disputes, since consumers or other internet users would choose to interact or transact only with those companies providing or subscribing to fair dispute resolution schemes. As has been pointed out above¹³⁹⁸ this expectation is likely to be disappointed¹³⁹⁹, as internet users are unlikely to read and digest standard terms and conditions of websites or other platforms and are unlikely to have disputes in mind when using the internet and even if they did, they may have no meaningful choice between different providers.

But it is suggested here that regulation by architecture may be more effective than the market. *Lessig* has explained computer code as functioning as the internet's architecture and that this architecture is not god-given, but can be used as a form of regulatory control. He argues that technology can create trust.¹⁴⁰⁰

Essentially a referral or clearinghouse system would provide a gateway through which individuals can find a fair online arbitration scheme, which they can trust. This system would provide an electronic white list of all existing online arbitration mechanisms complying with due process. A referral system is a website indexing, listing and linking to all dispute resolution providers providing arbitration compliant with the minimum due process criteria.¹⁴⁰¹ In other words a referral system amounts to an accreditation system, which if sufficiently monitored, updated and promoted, channels consumers to fair dispute resolution.¹⁴⁰² This gateway could be hyperlinked from relevant websites and internet fora- this would be an example of an architecture creating trust by providing access to fair redress systems. The gateway would not merely provide information about different dispute

¹³⁹⁸ In relation to consumer arbitration clauses in 7-2

¹³⁹⁹ T Schultz also argues that government intervention is necessary to regulate the fairness of ODR. see T Schultz fn 440 89 et sequi; he essentially argues that governments are trusted by disputants to provide fair dispute resolution.

¹⁴⁰⁰ The point Lessig makes is that internet architecture. its Code must be designed so as to create trust. see L Lessig fn 1222 Chapter 4 in relation to id technologies (equally relevant to dispute resolution)

¹⁴⁰¹ It would also be necessary for the referral system to evaluate and monitor compliance on an ongoing basis.

¹⁴⁰² See also M Philippe fn 413 183-184; T Schultz fn 440 94-100 makes a distinction between mere accreditation and clearing houses but this distinction seems to be more a matter of degree than substance.

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resolution providers, but in addition provide *the* access point for individuals seeking redress. Its function would be to exclude all providers who do not comply with minimum due process standards, thereby regulating due process. This function would be performed by *Code* rather than by legal rules as it is computer code (through hypertext linking and an interactive platform) which directs the disputant to the dispute resolution provider.

An example of such a system is the EEJ-net (European Extra-judicial Network)¹⁴⁰³ set up in 2001 by the European Commission for cross-border consumer disputes.¹⁴⁰⁴ At the heart of this system is a central consumer body (Clearing House or European Consumer Centre) in each Member State providing advice and assistance to consumers and citizens in that particular Member State. In order to help individuals wishing to bring a claim against a company established in another Member State, the national Clearing House will liaise with the equivalent Clearing House in that Member State in order to refer the consumer to the most relevant dispute resolution system in that other (foreign) Member State.¹⁴⁰⁵ This could be a court using some sort of small claims procedure or it could be an ADR provider, providing mediation or arbitration. For a dispute resolution provider offering arbitration to be included in the EEJ-net it has to comply with Recommendation 98/257/EC.¹⁴⁰⁶

In this fashion, the EEJ-net provides a referral system for ADR in all EU and EEA Member States, providing a one stop shop for cross-border dispute resolution complying with minimum fairness standards. By directing the consumer to the

¹⁴⁰³ See for example <http://www.eej-net.org.uk> ; A similar, parallel organization is the FIN-net, a network of dispute resolution for financial services disputes, see http://ec.europa.eu/internal_market/finservices-retail/finnet/index_en.htm#network [14. September 2007]

¹⁴⁰⁴ According to the Report 'The European Online Marketplace: Consumer Complaints 2005', published by the EEJ-net 1,834 complaints and disputes about e-commerce were received by the network in 2005 with non-delivery of ordered products constituting the largest area of complaints.

¹⁴⁰⁵ For more detail see R Bamford fn 790 108; Hörnle, J 'The European Extra Judicial Network-Overcoming the Obstacles' (2002) 7 *Communications Law* 143-145

¹⁴⁰⁶ And with Recommendation 2001/310/EC on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes for mediation and other forms of consensual resolution. The 1998 Recommendation only applies to binding arbitration procedures, whereas the 2001 Recommendation is applicable to consensual, non-binding forms of consumer dispute resolution.

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dispute resolution provider in the business' Member State the EEJ-net also overcomes any jurisdictional and enforcement issues.

However, it has already¹⁴⁰⁷ been pointed out that this Recommendation is insufficient and needs to be further developed. Furthermore, the European consumer organization, BEUC reported that not all ADR bodies notified by the Member States which are listed on the EEJ-net referral system are in fact complying with the principles enunciated in the Recommendation.¹⁴⁰⁸

Another issue with the current set up of the EEJ-net is that its coverage is far from being comprehensive.¹⁴⁰⁹ The EEJ-net does not oblige the Member States to create any new ADR schemes, but merely links up already existing provision of ADR schemes.¹⁴¹⁰

Some Member States have ADR initiatives focused on particular towns or regions¹⁴¹¹, whereas others have very specific ADR schemes only covering a particular type of business or sector¹⁴¹². Only very few Member States have a general consumer ombudsman scheme.¹⁴¹³ Austria has a dedicated Internet Ombudsman Service which has already been discussed in Chapter Five¹⁴¹⁴ and which is further mentioned below¹⁴¹⁵. Some Member States have not notified any compliant ADR schemes.¹⁴¹⁶

¹⁴⁰⁷ 6-2.2

¹⁴⁰⁸ Position Paper 'Alternative Dispute Resolution' of 21. November 2002 BEUC/X/048/2002, p. 3

¹⁴⁰⁹ BEUC Position Paper 'Alternative Dispute Resolution' of 21. November 2002 BEUC/X/048/2002, p. 3

¹⁴¹⁰ Bamford fn 790 109. Another issue is that traders may not agree to arbitration, this has already been discussed above in 8-2

¹⁴¹¹ For example in Belgium, Portugal, Germany and Spain;

http://ec.europa.eu/consumers/redress/out_of_court/adrrdb_en.htm [14. September 2007]

¹⁴¹² For example the Ireland, UK; http://ec.europa.eu/consumers/redress/out_of_court/adrrdb_en.htm [14. September 2007]

¹⁴¹³ Norway, Sweden, Denmark, Estonia, Finland and Greece have some sort of general dispute resolution scheme for consumer disputes, see http://ec.europa.eu/consumers/redress/out_of_court/adrrdb_en.htm [14. September 2007]

¹⁴¹⁴ 5-3.2

¹⁴¹⁵ 8-5 and 8-6

¹⁴¹⁶ Notably the Czech Republic, the Slovak Republic, Lithuania, Hungary, Slovenia and Malta, see http://ec.europa.eu/consumers/redress/out_of_court/adrrdb_en.htm [14. September 2007]

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Hence for many types of internet disputes there will be no relevant ADR scheme in the respondent's home Member State. Therefore, the establishment of a specific internet dispute ombudsman scheme should be considered at European or Member State level¹⁴¹⁷.

This is further discussed below.

5. Proportionality, Costs and State Funding

In Chapter Two the conflict between due process and effectiveness has been pointed out and it has been explained that a compromise has to be found by balancing due process with effectiveness.¹⁴¹⁸ This thesis proposes four possible solutions to this conflict: (i) the use of technology to increase access (so that more due process can be 'afforded'), (ii) the use of the proportionate model of dispute resolution, creating a model of online arbitration/an ombudsman, which, in terms of due process, is positioned between litigation and commercial arbitration, (iii) recognizing that some disputes are *de minimis*, ie of such small value that they cannot be solved by online arbitration or other forms of binding dispute resolution and (iv) a state subsidy for some disputes to increase access, paid from general taxation. In addition, this section also briefly considers the related issue of how the cost of online arbitration should be distributed between the parties.¹⁴¹⁹

The first solution, the use of online dispute resolution to increase access and efficiency has already been discussed at length in Chapter Five and will not be further discussed here.

¹⁴¹⁷ The only country which seems to have a dedicated internet ombudsman is Austria, which provides online mediation services for B2C e-commerce disputes, see <http://www.ombudsmann.at> [14. September 2007]

¹⁴¹⁸ 2-6

¹⁴¹⁹ There are of course other methods, such as legal aid. However the focus of this dissertation is on due process and not on how state funds are used to finance dispute resolution. The details of what form the state subsidy should take are outside the scope of this dissertation.

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The second element of a solution to this conflict is the concept of proportionate dispute resolution discussed in Chapter Seven, the idea that procedures should be appropriate to the nature of the dispute.¹⁴²⁰

This concept of proportionate dispute resolution entails that for high value claims formal litigation may be appropriate. For small disputes, especially if the disputants are located in different jurisdictions, online arbitration/an ombudsman scheme may be the only appropriate form of dispute resolution. It has been argued that, if there is a power imbalance between the parties, in order to make such procedures meaningful, minimum due process standards as outlined above, should be followed. This is in accordance with the principle of proportionate dispute resolution, as these minimum due process requirements are less formal and allow for some abbreviation of procedural complexities compared to the procedure before the courts.¹⁴²¹ The Model of online arbitration envisaged here is, in terms of due process, somewhere between litigation and commercial arbitration.

However this raises the question whether there should be a *de minimis*, whether disputes below a certain value cannot be solved at all by online arbitration. For example if an individual pays £7 by credit card for a book from an online company, which is never delivered, the question arises whether such a dispute could ever be solved by online arbitration satisfying the procedural due process outline above- the answer is likely to be negative. It could be argued that for disputes below a certain threshold value, payment card charge-back or negotiation are the only feasible forms of dispute resolution. If the dispute cannot be solved by such means, the party affected has to write off the loss.

Even if a claim is trivial, however, if the problem is widespread and systemic, so that a large number of individuals suffer (small) harm, this should be addressed, but

¹⁴²⁰ See the discussion in 7-4

¹⁴²¹ Even if they entail 'more' due process than traditional arbitration, where the parties are of more equal bargaining power and can therefore curtail procedural protections on the basis of the principle of party autonomy and the waiver principle.

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by regulatory compliance¹⁴²² through state enforcement or through criminal law in the case of fraud, rather than individual redress. However, since this thesis is only concerned with individual redress this will not be discussed here.

The difficulty is, however to state what this *de minimis* threshold should be. As a ballpark measure one could say that this should be 20% of the monthly average disposable income. Arguably 20% of the monthly average disposable income is roughly the amount any household can afford to lose without substantially damaging its standard of living. It could be argued that if the average household lost this money on an internet transaction, this could be written off without severe financial consequences. In other words this could be described as an acceptable risk. For the UK, the yearly average disposable income in 2005 was £13,300¹⁴²³. Twenty percent of the monthly average disposable income is about £200. So for claims below a value of £200¹⁴²⁴ it may be argued that online arbitration is not appropriate in any event, and that persons transacting online need to accept that there is a minimum level of financial risk for which redress cannot be achieved in all cases. This argument may run counter to intuition at first glance, as it seems that currently, many internet disputes are of small value¹⁴²⁵. The purpose of this thesis however is to construct a Model for *fair* dispute resolution and it has to be recognised that online arbitration which complies with due process standards will only be proportionate for certain disputes. Hence for claims of very small value different methods, such as negotiated assistance, online mediation or resolution through payment reverse mechanisms must be used.

¹⁴²² In the UK the Office of Fair Trading has enforcement powers under the Enterprise Act 2002 and in the US the Federal Trade Commission (FTC) has enforcement powers under the FTC Act. an overview of their internet enforcement cases can be found at <http://www.ftc.gov/bcp/internet/cases-internet.pdf> [14. September 2007]

¹⁴²³ National Statistics Online, see <http://www.statistics.gov.uk/cci/nugget.asp?id=1552> last visited April 2007

¹⁴²⁴ This is only a rough estimate, it could be argued that a maximum of 5% or 10% of the monthly income is the maximum which is affordable- this is not a point which is further examined here

¹⁴²⁵ See for example the average claim of £87 for the Austrian Internet Ombudsmann in 2006, quoted above in 5-3.2

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But even for higher value claims the question of costs is an issue. For high value claims the costs of online arbitration may well be proportionate. But there is likely to be a middle ground, where the claim is above the *de minimis* (which has been argued to be in the region of £200) but below the threshold which makes online arbitration worth pursuing. It is argued that therefore a state subsidy is needed.

In order to illustrate this argument further it is necessary to consider how much online arbitration costs with due process incorporated. Online arbitration involves paying for the time of the arbitrator, the cost of the administration of the dispute (assuming that the administrator of the online arbitration scheme would provide the technology) and legal advice and representation. Clearly the cost will vary enormously depending on how these tasks are carried out and by whom.

Assuming for the sake of argument that in a straightforward case, an arbitrator can be found who is willing to act for a fee of £500, the administration fee is £500 and legal representation does not exceed £500 for each party, the total aggregate cost would amount to £2000 in a relatively straightforward scenario.¹⁴²⁶

Looking at the AAA consumer arbitration costs¹⁴²⁷, a case with a claim value below US \$ 75,000 but above US \$ 10,000 attracts an administrative fee of US\$ 950 and an additional US\$ 300 if an in-person hearing is held, an arbitrator fee of US \$ 250 for a documents only arbitration¹⁴²⁸ and a fee of US \$750 if an in-person hearing is held. Hence the total for such a claim would be US \$ 1200, about £600 for documents only arbitration and US \$ 2000, about £ 1, 000 for arbitration with a hearing. If the value of the claim does not exceed US \$ 10,000, the administrative fee is US \$ 750 and an additional US \$ 200 if a hearing is held and the arbitrator fees are the same. Hence, for a claim of up to US \$ 10,000 the total is US \$ 1000, about £500 for documents-only arbitration and US \$ 1700 for arbitration with an in-

¹⁴²⁶ This is of course only a vague estimate of what it would cost to conduct an online arbitration. Since there is no travelling involved and administration through an online platform is more efficient, the procedure conducted offline would be even more expensive.

¹⁴²⁷ Effective 1. July 2003, available from <http://www.adr.org.sp.asp?id=22039> [14. September 2007]

¹⁴²⁸ This may include a telephone or online hearing

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person hearing, about £850.¹⁴²⁹ These figures work out between £500 and £1,000 *plus* any legal costs for both parties.¹⁴³⁰ If the parties choose to be legally represented and the legal costs are about £500 for each party, the total costs for the procedure are between £1,500 and £2,000.

Another example is the Chartered Institute of Arbitrators arbitration scheme for disputes involving consumers or a small business in dispute with companies, for which a registration fee of £500 plus VAT is payable by the company.¹⁴³¹ This scheme is a documents-only arbitration. Again there may be additional costs for legal advice and/or legal representation.

Straightforward arbitration, supported by online technology¹⁴³² is efficient, but nevertheless requires the time of a professional arbitrator, an administration institution and a legal advisor/representative and, on the figures illustrated above, may well involve total costs in the region of somewhere between £500 and £2,000¹⁴³³.

This raises the question whether the parties can foot this bill or whether the cost of online arbitration means that the parties will to a large extent be deprived of online arbitration. If a claim is smaller than, say £10,000 the cost of online arbitration may simply be too expensive for the parties, no matter how the actual cost is distributed. Therefore this thesis argues that some kind of subsidy is needed for disputes, where the claim is between £200 and £10,000.

¹⁴²⁹ The arbitrators' fees are only estimates for the purposes of the deposit, however the consumer's contribution is capped at US \$125 for disputes not exceeding US \$ 10,000 and at US \$ 375 for disputes between US \$ 75,000 and US \$ 10,000. The business has to pay the remainder.

¹⁴³⁰ The parties may use the AAA online platform, but the costs are the same.

¹⁴³¹ Para. 1.3 of the Rules for the scheme

¹⁴³² http://www.idrs.ltd.uk/Consumer/PDF/ICAS_Rules_Application.pdf [14. September 2007]

¹⁴³³ For forms of technology, see 5-4.5

¹⁴³³ Depending on the degree of technology used, the efficiency of the administration, complexity and duration of the cases and whether the parties are legally represented/advised.

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It should be recognised that fairness, due process, access to justice and ultimately the rule of law are important values which should be supported through public funding through tax. After all, the courts are financed by the public purse, so it seems not illogical to argue that this should also apply to online arbitration.

An alternative could be some form of insurance. However insurance is only functional if the risk is spread widely and if an insurance levy was imposed on e-commerce or even internet access, this would amount to a form of taxation which would hinder this form of technology and be contrary to the policy that the internet should not be subject to special forms of tax. Therefore an insurance scheme is likely to be politically unacceptable. Finally, this funding could come through regulatory action, imposing a regular levy on industry to at least partially fund an internet ombudsman service, in a similar fashion than the communications services ombudsman and the financial services ombudsman. While such a scheme should be considered, at the present point in time it seems unlikely to be politically acceptable, as the internet, unlike the areas of financial services or telecommunications, is not heavily regulated, but only subject to light-touch regulation. Furthermore, the internet sector is not homogenous and thus it would be hard to identify who should pay.

Therefore a regular levy is probably not practical, but companies should be made to pay the greater part of the fees if and when a dispute is solved by online arbitration (on a case-by-case basis). This is further discussed below.

Therefore, funding should come from general taxation to ensure access to justice for internet disputes. A good example for a dispute resolution procedure financed by public funds is the Austrian Internet Ombudsmann, described in Chapter Five.¹⁴³⁴

This leaves the final issue to be considered, *ie* the question of how the costs of online arbitration should be distributed between the parties. The distribution of

¹⁴³⁴ 5-3.2

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costs can serve as an important counterpoise to pre-existing inequality between the parties.

If the loser pays the winner's costs, an individual may be barred from access to online arbitration if costs are high as he or she may not be able to take the risk of losing the case and having to pay for cost.

Therefore, it is proposed here that under an online arbitration scheme for internet disputes, individuals (as the 'weaker' party) should pay a certain amount towards the cost of online arbitration, possibly capped at a maximum of between £20 and £100 depending on the value of the claim¹⁴³⁵, in order to deter vexatious claims. However it is submitted that individuals, when claiming against companies should not have to pay the full cost, even if they lose their case, in order to increase access to justice and to level the power imbalance in such cases. Companies should have to pay a larger share of the cost of online arbitration on a case-by- case basis.¹⁴³⁶ If a dispute is between individuals, they have to share the costs equally, hence there is an even greater need for a state subsidy to increase access to dispute resolution.

In conclusion on the cost issue, it is suggested in this thesis that for claims up to a value of £200, online arbitration or an ombudsman scheme is not proportionate¹⁴³⁷. For claims between £200 and £10,000 it is argued that online arbitration may not be proportionate, but it has been argued that the parties should not be forced to abandon their claim and that hence some form of subsidy, coming from general taxation is required. Parties should pay part of the cost, with the individual's contribution being capped. For claims above £10,000 there is arguably no need for a state subsidy.

¹⁴³⁵ See for example also OECD Recommendation on Consumer Dispute Resolution and Redress. July 2007, Recommendation II A 1, which recognises that some costs *may be* imposed on the consumer, but that this cost must not be disproportionate to the claim

¹⁴³⁶ This contribution could be tapered according to the size of the corporate entity: see 3-6.1

¹⁴³⁷ Comparing the value of the claim with the costs

6. The Model: Resolution of Internet Disputes

The Model for the resolution of internet disputes proposed in this thesis is a jigsaw puzzle with different elements. The main elements proposed are: (i) non-binding forms of ODR, (ii) redress against online merchants provided by payment providers, (iii) online arbitration provided by private schemes, (iv) a statutory ombudsman and (v) litigation. While this thesis focuses on online arbitration (including online ombudsmen) and its benefits for internet disputes, it acknowledges the role of other forms of ODR and litigation as parts of this jigsaw puzzle. Hence, this thesis does not propose that online arbitration is the only form of dispute resolution. The significance of online arbitration is that it widens the availability of (and access to) binding dispute resolution.¹⁴³⁸ The following outlines the essential elements of the Model and how they each fit into the puzzle.

6.1 Non-binding forms of ODR

Non-binding forms of dispute resolution can terminate a dispute without the need for a binding decision. It has been discussed in Chapter Four that online mediation should be used as a mechanism before online arbitration to filter out the disputes where a compromise can be found.¹⁴³⁹ Non-binding forms of ODR are complementary to online arbitration and may, in particular solve disputes which fall below the *de minimis* threshold for online arbitration. As an example for this, Paypal's assisted negotiation dispute resolution programmes have been discussed above.¹⁴⁴⁰

¹⁴³⁸ See 5-5

¹⁴³⁹ 4-3

¹⁴⁴⁰ See the discussion of the 'Item Not Received or Significantly Not as Described', 'Unpaid Item' and 'Mutual Feedback Withdrawal',¹⁴⁴⁰ programmes 3-8.2

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6.2 Payment reverse mechanisms

Payment reverse mechanisms, such as credit charge backs have been outlined in Chapter Three¹⁴⁴¹. They can provide a remedy where a party claims that payment should be reversed. They are also an important mechanism for disputes which fall below the *de minimis* threshold for online arbitration.

6.3 Online arbitration

Online arbitration is the most important jigsaw piece for the Model proposed and this sections outlines, by way of summary, the main issues.

6.3.1 *De Minimis*

In recognition of the principle of proportionality, it has been argued in this Chapter¹⁴⁴² that there should be a *de minimis* threshold below which disputes cannot be solved by online arbitration. This has been set at a figure of approximately £200 on the basis of affordability.¹⁴⁴³ Disputes below this threshold should be solved by non-binding forms of dispute resolution or payment reverse mechanisms.

6.3.2 Due process standards & their implementation

The main concern of this thesis is the *fair* resolution of internet disputes and it has been argued that, in order to achieve this, minimum due process standards, set at a higher level than those pertaining to traditional arbitration, should be incorporated in all online arbitration procedures. This Chapter has already outlined these standards¹⁴⁴⁴ and how they could be implemented by professional bodies and

¹⁴⁴¹ 3-8

¹⁴⁴² 8-5

¹⁴⁴³ See the discussion above in 8-5

¹⁴⁴⁴ 8-3

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arbitration institutions, national legislation, a clearing house referral system and, on the international plane, a new convention¹⁴⁴⁵.

6.3.3 Contractually mandated online arbitration

The greatest challenge for online arbitration is how to bring the parties before the online arbitrator. As has been discussed in Chapter Four¹⁴⁴⁶ arbitration is largely¹⁴⁴⁷ based on the *agreement* between the parties and this raises the question of how to make this form of dispute resolution available against an unwilling party, to protect the 'weaker' party in dispute resolution. Essentially a trusted party who commits the parties to use online arbitration is needed. As has already been discussed¹⁴⁴⁸ there are two ways to achieve this.

If the dispute arises from the activities of a platform (such as an online auction¹⁴⁴⁹, a social networking site¹⁴⁵⁰ or a video sharing site¹⁴⁵¹) arbitration could be made a condition for the participation in the activity. Participants would agree to online arbitration for the benefit of other participants or third parties. The platform operator could refer the parties to online arbitration (maybe after online mediation has been attempted but failed) at no cost to the operator.

Secondly, companies engaging in business activities on the internet should consider joining a trust mark scheme, which incorporates online arbitration (possibly as part

¹⁴⁴⁵ 8-4

¹⁴⁴⁶ 4-3.2

¹⁴⁴⁷ With the exception of statutory arbitration, for example in England

¹⁴⁴⁸ See the discussion above 8-2

¹⁴⁴⁹ eBay for example does not bind buyers and sellers on its auction platform to (online) arbitration

¹⁴⁵⁰ Facebook, for example provides for arbitration of disputes between itself and its users, but not for disputes between users or between a user and a third party. The terms expressly provide 'no disputes or claims relating to any transactions you enter into with a third party through the Facebook Marketplace may be arbitrated', see Terms (24/5/2007) available from <http://www.facebook.com/terms.php> [14. September 2007]

¹⁴⁵¹ YouTube, for example also does not include arbitration between users or users and third parties in its terms and conditions, see <http://www.youtube.com/t/terms> last visited in August 2007

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of an escalated dispute resolution procedure, moving from assisted negotiation to online mediation and then to online arbitration).¹⁴⁵²

For both ways of contractually mandated online arbitration, the costs should be shared between the parties, and the company should pay a greater share than the individual.¹⁴⁵³ Both, online platforms and online companies would benefit from such referral, as it would make their activities ‘safer’ and more trustworthy, as participants would know that binding dispute resolution and redress is available. Therefore it is highly recommended that online platforms and individual online companies refer the participants in their activities to online arbitration *before* a dispute arises.

6.3.4 UK National Online Ombudsman Office

The second answer to the challenge of bringing the parties before the online arbitrator is the creation of a national Online Ombudsman Office (OOO). This should be put on a statutory footing. The legislation should provide for the procedural rules of the OOO incorporating the due process standards outlined above¹⁴⁵⁴ and addressing costs and payment issues. In order to keep costs down and avoid the need for legal representation, the procedure should be inquisitorial- the ombudsman should to a large extent managing the evidence and submissions.

One design issue is whether there should be only one OOO (similar to the Financial Ombudsman or the Austrian Internet Ombudsmann) or whether there should be several providers (similar to the UDRP). The advantage of having more than one provider is that competition between providers reduces costs and means that companies have a choice as to which scheme to join (which makes it easier to argue that there is an arbitration agreement)¹⁴⁵⁵. However the disadvantage is that due

¹⁴⁵² See the discussion above 8-2.1

¹⁴⁵³ See the discussion above 8-5

¹⁴⁵⁴ 8-3

¹⁴⁵⁵ Discussion above 8-3.2.2

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process may seriously be compromised as the providers will not only compete on the basis of cost, but also on whether they effectively represent the interests of the companies.¹⁴⁵⁶ In other words providers will have to appear friendly to the interests of online companies¹⁴⁵⁷. This has been discussed in Chapter Seven¹⁴⁵⁸ and above¹⁴⁵⁹. For this reason it would be preferable to have only one OOO.

In order to bring the parties before the online arbitrator it will be necessary to make it compulsory for companies conducting business online to join the OOO scheme.¹⁴⁶⁰ This would address the problem of companies avoiding the jurisdiction of the OOO. The scheme should be asymmetrical- compulsory for companies to join, but voluntary for individuals in the sense that they can opt to agree to the OOO online arbitration *after* the dispute has arisen, by submitting the dispute to the OOO or by agreeing (or refusing) to defend a dispute brought against them before the OOO. Only if an individual refuses to agree to online arbitration before the OOO, should the company be able to litigate before the courts. Individuals would be encouraged (but not forced) to use the OOO.

The legislation should impose an obligation on companies to join the OOO online arbitration scheme, by entering into an agreement with the OOO. If a company flouts this statutory obligation it would be in breach of law and regulatory enforcement action can be taken.¹⁴⁶¹ Such enforcement action could include undertakings by the company that it will join the OOO online arbitration scheme and, if this is not complied with, a power of the regulator to apply for an injunction to compel membership in the OOO scheme. However, the OOO would have no jurisdiction unless and until the company has agreed to the OOO online arbitration

¹⁴⁵⁶ Examined in the context of the UDRP.

¹⁴⁵⁷ Albeit that this is not a homogenous group

¹⁴⁵⁸ 7-3.2.1

¹⁴⁵⁹ 8-3.2.2

¹⁴⁶⁰ Discussion above 8-2.2

¹⁴⁶¹ The Enterprise Act could be amended to bring this within the remit of the OFT. The issue with this construction would be that for the Model the definition of the weaker party not only includes consumers, but all individuals. Another alternative would be to amend the Communications Act and establish the OOO under OFCOM's supervision. Or, thirdly a new piece of legislation may establish a new regulator creating and supervising the OOO and enforcing the statutory obligations of companies conducting online activities.

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scheme. This is important, as for the New York Convention, arbitration must be based on agreement. Under this construction, the OOO scheme would be arbitration, with the consequence that an OOO award can be enforced in a foreign jurisdiction under the New York Convention.¹⁴⁶²

Another design question relates to the jurisdictional reach of the OOO.¹⁴⁶³ In particular the question arises whether the statute could bind companies *established* in a foreign jurisdiction to join the OOO scheme. If the foreign company can be said to have directed or targeted its online activities to the territory, the UK could assert prescriptive jurisdiction on the basis of the territoriality principle.¹⁴⁶⁴

Even if the UK was justified to apply the statute to foreign companies under international law, nevertheless the question arises whether this assertion of jurisdiction would be practical or effective. If a foreign company did not join the OOO scheme and if it refused to take part in any proceedings before the OOO, the OOO would have no jurisdiction. A UK based individual wishing to bring a case against the foreign company would be limited to bringing a complaint before the regulator, who may, in its discretion, decide to bring regulatory action against that company. Although the company's local regulator may or may not enforce that regulatory action by the UK body, it would in itself involve negative publicity and put pressure on the company to join the scheme. At this stage it should be pointed out that the OOO effectively would be providing a valuable service for online companies by providing subsidized¹⁴⁶⁵, fair dispute resolution, which should

¹⁴⁶² See the discussion above

¹⁴⁶³ The Austrian Internet Ombudsmann covers consumers resident in Austria who claim against companies in Austria or abroad (this reach is limited to the EU). The difference is, of course that the Austrian Internet Ombudsmann is not compulsory, see the discussion in 5-3.2

¹⁴⁶⁴ States have asserted jurisdiction in cases, where all the relevant acts were carried out in another jurisdiction and all the relevant actors were located outside the jurisdiction on the basis that the effects of those acts were felt within the jurisdiction. International law has recognised for some time that states have authority to regulate activities, that originate abroad, but cause local harms, V Lowe, 'Jurisdiction', Chapter 10 in M. Evans (ed) *International Law* (Oxford University Press, Oxford 2003). 329-355. 338-339; A detailed discussion of jurisdiction under (public) international law is outside the scope of this thesis. The issue of territoriality is raised here, but would have to be further refined in the details of the legislation.

¹⁴⁶⁵ See the discussion of costs below

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enhance the reputation and branding of the companies involved. Therefore, once foreign companies are aware of the scheme they are likely to join.

Another question arises whether the OOO scheme as outlined above would be in breach of the country of origin rule in Article 3 (2) of the E-commerce Directive 2000/31/EC.¹⁴⁶⁶ However it is doubtful that it could be argued that a dispute resolution scheme is a *restriction* of the provision of online services. As has been pointed out in the previous paragraph, the scheme's purpose is to promote cross-border services by providing subsidized online arbitration.

Finally, as to costs, it has already been mentioned¹⁴⁶⁷ that the individual should have to pay a small contribution to the costs in order to deter vexatious and frivolous claims. The OOO scheme should only be available for claims where the amount of the claim exceeds £200¹⁴⁶⁸. Companies should have to pay a larger share of the cost of online arbitration on a case-by- case basis. But most importantly, the OOO scheme should be subsidised by general taxation¹⁴⁶⁹ to cover the gap between disputes where online arbitration is otherwise not cost-effective. It has been argued above that for claims below £10,000 such a subsidy is urgently needed.¹⁴⁷⁰

6.3.5 New Convention to overcome two potential obstacles to New York Convention

In the context of internet dispute resolution, there are important limitations to the enforceability of foreign awards under the New York Convention. These limitations apply to consumer arbitration and may apply to statutory ombudsman decisions.¹⁴⁷¹ It is therefore suggested that a new convention should be negotiated which on the

¹⁴⁶⁶ Clearly an examination of the scope of the country of origin rule is outside the scope of this thesis, as there is no room to do this in detail.

¹⁴⁶⁷ 8-5

¹⁴⁶⁸ See the discussion above 8-5

¹⁴⁶⁹ In Austria the Internet Ombudsmann is not only subsidized but paid for by public funds (and donations), see 5-3.2

¹⁴⁷⁰ See the discussion above 8-5

¹⁴⁷¹ See the discussion above 8-2.2

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one hand incorporates strict minimum due process standards into online arbitration procedures for internet disputes¹⁴⁷², but on the other hand provides for enforceability of online arbitration awards and ombudsman decisions across borders. Politically, such a convention may have greater success than the Hague Jurisdiction Convention, as in the US consumer arbitrations are common and their enforceability in the EU may be desirable from an US point of view, whereas the EU may be interested in increasing due process for the arbitration of consumer and other internet disputes as a safeguard against exploitation of the 'weaker' party.

6.4 Litigation

The final piece of the jigsaw is, of course, litigation. This is only available for the largest of claims.¹⁴⁷³ There is nothing new about litigation in the Model and hence this will not be discussed further.

7. Conclusion

This thesis has (hopefully) shown that there is a need for online arbitration and an ombudsman scheme for the resolution of internet disputes, particularly for disputes where the parties are subject to a power imbalance.

The issue here is that there is a great potential for providing greater access to justice through ODR, which has not been exploited. The main problem is bringing the parties to the dispute before the online arbitrator since pre-dispute arbitration clauses are prejudicial to individuals pitched against a corporate entity and since companies may not agree to participate in arbitration after the dispute has arisen. This Chapter has suggested two solutions to this: the creation of a compulsory ombudsman scheme for internet disputes and online arbitration schemes contractually mandated by the operator of the online activity. The disadvantage of

¹⁴⁷² As defined in 3-6.3

¹⁴⁷³ 3-9

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an ombudsman scheme is that its jurisdictional reach and enforceability of awards under the New York Convention is unclear and here new international rules should be worked out. State funding should also be used to increase access to justice and minimise the burden on companies involved in internet disputes.

This Chapter has also set out the minimum standards, which should apply to such online arbitration schemes, drawing on the conclusion from the previous chapters. It has discussed how these could be implemented. For implementation, a mixture between institutional rules, national framework legislation, an international convention to deal with recognition and enforcement and a regional or international referral system has been suggested.

This thesis has developed a Model for the resolution of internet disputes between individuals and companies. While the combination of cross-border litigation and traditional arbitration, the latter curtailing due process on the basis of the principle of party autonomy and the waiver principle, is not sufficient as a model for the resolution of such disputes, this thesis has proposed a new Model adding online arbitration and an ombudsman with minimum due process guarantees to the existing methods. Hopefully this would avert any Michael Kohlhaases from making an appearance on the internet.

List of Abbreviations

AAA	American Arbitration Association
ABA	American Bar Association
ACPA	Anti-Cybersquatting Consumer Protection Act (US legislation)
ADNDRC	Asian Domain Name Dispute Resolution Centre
ADR	Alternative Dispute Resolution
B2B	Business to Business
B2C	Business to Consumer
BEUC	Bureau Européen des Unions de Consommateurs (European Consumer Organisation)
CIArb	Chartered Institute of Arbitrators
CIETAC	China International Economic and Trade Arbitration Commission
CISAS	Communication and Internet Services Adjudication Scheme
CCLS	Centre for Commercial Law Studies, Queen Mary University of London
C2C	Consumer to Consumer
CoE	Council of Europe
CPR	Civil Procedure Rules 1998
CPR	International Institute for Conflict Prevention & Resolution
DIS	Deutsches Institut für Schiedsgerichtsbarkeit
DOC	US Department of Commerce
DTI	UK Department of Trade and Industry
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EComHR	European Commission of Human Rights (before the 1998 reforms)
ECJ	European Court of Justice
EEJ-net	European Extra- Judicial Network
EU	European Union
FAA	Federal Arbitration Act 1925 (US)
FOS	Financial Ombudsman Service
FSA	Financial Services Authority
FSMA	Financial Services and Markets Act
FTC	Federal Trade Commission (US)
GAFTA	Grain and Feed Trade Association
G2B	Government to Business
G2C	Government to Consumer
HCPIL	Hague Conference for Private International Law
IBA	International Bar Association
ICAC	International Commercial Arbitration Court (Moscow)
ICC	International Chamber of Commerce
ICDR	American Arbitration Association International Center for Dispute Resolution
ICSID	International Center for the Settlement of Investment Disputes
ICT	Information and Communications Technology

List of Abbreviations

IP	Intellectual Property
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICPEN	International Consumer Protection and Enforcement Network
ICT	Information and Communication Technologies
IP	Internet Protocol
ISP	Internet Service Provider
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitration Association
NAF	National Arbitration Forum
NCAIR	National Center for Automated Information Research
NYC	New York Convention of 1958
ODR	Online Dispute Resolution
OCR	Optical Character Recognition
OECD	Organisation for Economic Co-operation and Development
OFT	UK Office of Fair Trading
OTELo	Office of the Telecommunications Ombudsman
SME	Small and Medium Sized Enterprises
UDRP	Uniform Domain Name Dispute Resolution Procedure
UNTS	United Nations Treaty Series
UNCITRAL	United Nations Commission for International Trade Law
UNECE	United Nations Economic Commission for Europe
URL	Uniform Resource Locator
WIPO	World Intellectual Property Organization
WIPO Center	WIPO Arbitration and Mediation Center
YBCA	Yearbook of Commercial Arbitration

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Annex : The Jurisdictional Challenge of the Internet

There is always a 'but' in this imperfect world.

(Anne Brontë (1820-1849))

1. Introduction

As we have seen from Chapter Three, global interactions on the internet lead to an increase in international contacts and hence ample opportunities for cross-border disputes and conflicts between different types of disputants.

The function of this Annex is to show that cross-border litigation and enforcement is so expensive and time-consuming that access to this form of dispute resolution is barred but for the largest claims. For small claims the costs and delay of cross-border litigation are frequently not proportionate to the remedy eventually obtainable.

There are essentially three reasons for the high costs and delay: (i) the complexity of jurisdictional rules stalling the finding of the appropriate forum, (ii) cross-border enforcement (where necessary) and (iii) other cross-border aspects (such as the application of foreign law and the need for translation). This Annex will discuss these issues in turn.

It explains why the existing rules on jurisdiction pose a significant challenge for internet disputes. As this Annex will demonstrate in detail, the application of conflicting jurisdictional rules is enormously complex, unpredictable and uncertain in internet cases, as jurisdictional rules are based on concepts of territorial connecting factors which are highly ambiguous in internet cases.

Secondly, if a judgment must be enforced across a border, enforcement also involves some procedure entailing costs and delay and differences between national approaches also mean that successful claimants have no right to have foreign judgments enforced against defendants' assets, introducing an element of unpredictability.

Finally, other cross-border aspects, such as the application of foreign law, translation, the need to hire several legal advisors or advocates, and travelling add further expense and delay.

This Annex concludes that international litigation is unsuitable to solve disputes in many small value internet disputes. For this reason this thesis focuses on Online Dispute Resolution as a way forward for the resolution of internet disputes.

2. Jurisdictional Rules

2.1 Unsatisfactory rules for internet disputes

Many authors have suggested that the traditional jurisdictional rules are not suitable for internet cross-border disputes. For example, *Matthew Burnstein* points out that

‘Where activities occur-or, more precisely, where we *deem* them to have occurred-answers the traditional questions of jurisdiction and choice of law under conventional private international law analysis. But *where* activities occur might not be the right inquiry for private international law in Internet law disputes. I propose that we adapt private international law to the realities of the Internet.’¹⁴⁷⁴

Henry Perritt adds that the

‘Traditional dispute resolution machinery depends on localization to determine jurisdiction. Impediments to localization [on the internet] create uncertainty and controversy over assertions of jurisdiction. That uncertainty has two results. It may frustrate communities that resent being unable to reach through their legal machinery to protect local victims against conduct occurring in a far-off country. It also subjects anyone using the Internet to jurisdiction by any of nearly 200 countries in the world and, in many cases, to their subordinate political units.’¹⁴⁷⁵

FA Mann recognised this problem already in 1964. He wrote that modern communications technology and cross-border media (referring to telephone, teleprinter, television and international advertising) mean that it is increasingly more difficult to localise facts, events or relationships. He pointed out that the distribution of content across a multitude of countries might mean that the territorial test is too readily satisfied and would generate suspicion of the rigidity of present rules.¹⁴⁷⁶ These deficiencies (and the suspicion) have grown with the use of the internet for global transactions and interactions.

The next section will look at the jurisdictional rules in England and the EU. Because of lack of space it will focus on jurisdiction only and not look at applicable law¹⁴⁷⁷. It will look at the consumer protection provisions of the Rome Convention

¹⁴⁷⁴ M Burnstein ‘A Global Network in a Compartmentalised Legal Environment’ in K Boele-Woelki, C Kessedjian (eds.) *internet Which Court Decides? Which Law Applies?* (Kluwer Law International The Hague 1998) 23-34, 27

¹⁴⁷⁵ H Perritt ‘Dispute Resolution in Cyberspace: Demand for New Forms of ADR’ (2000) 15 *Ohio State Journal on Dispute Resolution* 675-703, 675-676

¹⁴⁷⁶ FA Mann ‘The Doctrine of Jurisdiction in International Law’ (1964-I) 111 *Recueil des Cours* 9-158, 35-37

¹⁴⁷⁷ Hence there is no detailed discussion of the Rome Convention, or the proposed Rome I Regulation, or the Regulation 864/2007/EC on the Law Applicable to Non-contractual Obligations (Rome II) of 11. July 2007, OJ L199/40 of 31. July 2007 pp. 40-49 harmonising the rules on the law applicable to torts (and other non-contractual obligations) for the first time at EU level

and the proposed Rome I Regulation, for the reason that they shed some interesting light on the consumer provisions in the Jurisdiction Regulation.

2.2 English/EU law

The rules on jurisdiction (determining a court's competence) are not international law, but part of the internal rules on civil procedure in each jurisdiction.¹⁴⁷⁸ Hence, they differ from jurisdiction to jurisdiction.¹⁴⁷⁹ In Europe there has been partial harmonisation on the basis of regional multi-lateral treaties and on the basis of the competency contained in Article 65 of the EC Treaty on judicial co-operation in civil matters having cross-border implications.¹⁴⁸⁰

The following sections look at English law and the harmonised EU rules to illustrate the twin problems of localising internet interactions and determining and limiting the reach of a particular activity on the internet. They have a greater focus on torts than on contracts, as in contracts the issue of jurisdiction is more frequently resolved by an express jurisdiction clause in the contract. If contracts contain a clause determining the jurisdiction of the court, this will usually be accepted¹⁴⁸¹ (subject to special rules¹⁴⁸², e.g. in relation to some consumer contracts).

2.2.1 Contract-difficulty to pinpoint activities

In the absence of an express choice, whether jurisdiction is covered by EU law (the Jurisdiction Rules) or English law (the common law rules), one of a list of grounds for assuming jurisdiction must be fulfilled, albeit these grounds differ under the common law and the Jurisdiction Regulation. Generally speaking, they are factors connecting the dispute with the (English) forum. If a contract does not contain a jurisdiction clause, one of these grounds must be relied upon.

(a) Contract made within the jurisdiction

One of the common law grounds for serving a non-EU defendant with a claim form outside the jurisdiction is that the contract was made within the jurisdiction.¹⁴⁸³ It has been the rule that if a contract is made via letter by parties in different jurisdictions, the contract would be made at the place where the letter of acceptance

¹⁴⁷⁸ FA Mann fn 1476 9, 19; P North, J Fawcett *Cheshire and North's Private International Law* (13th ed Butterworths London 1999) 13-14

¹⁴⁷⁹ P North, J Fawcett fn 1478 9 et seq

¹⁴⁸⁰ Council Regulation EC/44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 22. December 2000 OJ 2001 L12 pp.1-23; Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27. September 1968; Rome Convention of 19. June 1980 on the Law Applicable to Contractual Obligations of 26. January 1998, OJ C027 pp 34 -46

and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16. September 1988

¹⁴⁸¹ Art.23 of the Jurisdiction Regulation EC/44 2001 and CPR 6.20 5 (d)

¹⁴⁸² Articles 8-14 (insurance); 15-17 (consumers) and 18-21 (employment contracts)

¹⁴⁸³ CPR 6.20 (5) (a)

is posted.¹⁴⁸⁴ However, if the contract has been concluded using means of electronic communication, it is not always clear where the contract was made.

For example, if one of the parties made a contractual offer by email and the other party accepts that offer by emailing an acceptance to the offeror's email address, it might be difficult to determine where precisely the offer has been accepted. There are two reasons for this, one is that the application of the postal rule is unclear and the other is that the email acceptance passes through several machines before it reaches the offeror.

Postal rule

The so-called 'postal rule' under English law mandates that an acceptance communicated through the post by letter or telegram takes effect at the place where it is handed over to the post office.¹⁴⁸⁵ By contrast, if the acceptance is sent by a method of instantaneous communication, such as telephone or telex, the contract is made at the place where the acceptance is received.¹⁴⁸⁶ The immediacy of instantaneous communications enables the acceptor sending his message to notice if the communication is interrupted or breaks down. As *Lord Justice Denning* has pointed out in the *Entores* case:

'In all instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or has reason to know it. So he must repeat it.'¹⁴⁸⁷

Hence it is the acceptor's responsibility to ensure that the message arrives at the offeror's machine (telex or telephone) and this is where the contract is formed.

There is no direct authority on the question whether communication by email is instantaneous. Arguing by analogy, it becomes obvious that it is difficult to categorise email in either category.

On the one hand, email resembles non-instantaneous, postal communication. Unlike telex or the telephone, email is not direct between the parties, since messages are broken up into packets and travel through a number of computers connected to the

¹⁴⁸⁴ L Collins *Dicey, Morris & Collins The Conflict of Laws* (14th ed Sweet & Maxwell London 2006) 377

¹⁴⁸⁵ *Adams v Lindsell* (1818) 1 B&Ald 681. In *Cowan v O'Connor* (1888) 20 QBD 640, 642 Hawkins J held that if the acceptor replied to the offeror's telegram by sending a telegram, the acceptor's reply was considered to be given at the telegraph office from which the telegram was sent. In that case the acceptor's telegram was sent from the City of London so that the Lord Mayor's Court had jurisdiction.

¹⁴⁸⁶ *Entores LD v Miles Far East Corporation* [1955] 2 QB 327 (CA) 334 confirmed by the House of Lords in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* [1983] 2 AC 34 (HL) 42. Interestingly, in a very recent case, *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch) Para.37 Justice Mann suggested that the rule in *Entores* and *Brinkibon* should be reconsidered. Regarding instantaneous communications, he said that

'the law may have to move on and to recognise that there is nothing inherently wrong or heretical in allowing the notion of a contract made in two (or more) jurisdictions at the same time.'

¹⁴⁸⁷ *ibid* 333

networks, before they are re-assembled at the recipient's end. Secondly, emails are not always instantaneous, nor are they reliable. The process of sending an email normally only takes few minutes, more commonly seconds. However, the transport protocols underlying emails only provide a best efforts service- instantaneous transmission is not guaranteed and the underlying protocols were not designed to confirm delivery for legal purposes. There is no sure means for the sender to detect whether or not the email has reached the mailbox of the recipient (apart from the sender contacting the recipient to ask). Even where the acceptor has set his or her email software to provide a delivery receipt, this in turn is not instantaneous, nor does it reveal whether or not the contents of or attachments to the message arrived in uncorrupted form or have actually been read.

Hence, *Andrew Murray*¹⁴⁸⁸ suggests that the postal rule should apply to email acceptances, as they are not direct, nor instantaneous and the acceptor sending his or her email does not know immediately whether or not the communication was successful.

On the other hand, an argument can also be made that email should be treated by analogy to instantaneous communications and the postal rule should not apply to email.¹⁴⁸⁹ Although email is not a direct communication between the sender and the recipient's machine, no third *human* party is involved- this distinguishes email from a telegram or normal post. Secondly, since email usually is quick and only takes a few minutes or seconds to arrive, it is not unreasonable for the parties to actively acknowledge the receipt of emails. One solution would be for the parties to agree that, as a matter of standard practice, an email is deemed to be received, when the sender receives the recipient's acknowledgement of receipt.¹⁴⁹⁰ Thus, under this practice, if the acceptor does not receive an email back from the offeror that his or her email acceptance has been received, he or she can make enquiries-all of this without causing much delay.

*Treitel*¹⁴⁹¹ also suggests that electronic communications such as email, website trading¹⁴⁹² or fax occupy an intermediate position. According to Treitel, whether the

¹⁴⁸⁸ A Murray 'Entering into contracts electronically: the real www' in L Edwards, C Waelde *Law & the internet* (2nd ed Hart Oxford 2000) 17-35, 24-25; also C Gringrass *The Laws of the internet* (Butterworths London 1997) 25

¹⁴⁸⁹ R Stone *The Modern Law of Contract* (5th ed Cavendish London 2002) 52-54; also M Selick 'E-Contract Issues and Opportunities for the Commercial Lawyer' (2003) 16 *Banking and Finance Law Review* 1-45, 26-27

¹⁴⁹⁰ 1996 UNCITRAL Model Law on Electronic Commerce, Art.14 (3): if a data message has been made conditional on receipt, the data message is treated as though it has never been sent until the acknowledgement is received- however Art.14 is not concerned with contract formation Art.14 (7). Furthermore the EU E-commerce Directive 2000/31/EC, Art.11 (1) also provides that businesses must acknowledge a consumer's order by electronic means and without delay (again leaving open the question as to when and where the contract is concluded). However this only applies to webforms and not to email contracts.

¹⁴⁹¹ GH Treitel *The Law of Contract* (11th ed Sweet & Maxwell London 2003) 26

¹⁴⁹² Arguably communication through and with a website is more likely to be instantaneous, as the sender will know whether or not the communication has been interrupted, see *Murray* fn 1488 25-26: 'the main

acceptance has to reach the offeror depends in each case on whether the acceptor sending the message containing the acceptance had the means of knowing at once whether the communication was or was not successful.

Ultimately, it is not clear whether email is an instantaneous form of communication (in the *Entores* meaning of the word) and whether the postal rule applies. Thus, in cases where the communication is successful and a contract is concluded and the only question is not *if* but *where* a contract was concluded this intermediate position does not provide the answer. If the parties are communicating across a border it is unclear where the contract was concluded. Returning to the example, if the acceptor sends his email acceptance from England, it is unclear whether the contract was made within the jurisdiction under CPR 6.20 5 (a) and whether the English courts can assume jurisdiction.

Message passing through several computers

In addition, even if it could be assumed that the postal rule applies to acceptances communicated by email, this still leaves open the question of where an email is sent *from*, as the message may pass through several computers before it leaves the acceptor's network. This could be:

- (i) the computer on which the email containing the acceptance is generated or
- (ii) the computer which provides access to the internet.

These two computers could be in different countries. For example the acceptor could be travelling in Russia, sending the acceptance from a mobile device, which is then forwarded to his or her internet access provider, whose computers are located in California. The email may well pass through a network of computers located in different jurisdictions before it is sent out via the internet. In this case, it will be difficult to determine the country from which the message was sent.

Likewise, if the contract was legally deemed concluded *where* the message is *received* the same issue arises, as again the mail may be passed between different computers, located in different jurisdictions, before it reaches the recipient offeror. For example, the internet service provider of the offeror may host the offeror's mailbox on a server in California. The offeror may access his mailbox from a mobile device, while travelling in Kenya- this raises the question as to where the email is received.¹⁴⁹³

difference between click wrap contracts and email is that communications between web clients and servers, unlike email is instantaneous (...) If either party goes offline at any point the other will be aware of this change in status.'

¹⁴⁹³ Because of these difficulties of locating dispatch and receipt of electronic messages, the 1996 UNCITRAL Model Law provides in Art.15 (4) that an electronic message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business; see also to the same effect Art.10 (3) of the UN Convention on the Use of Electronic Communications in International Contracts of 23. November 2005

(b) Place of performance of contractual obligation or breach of contract

Further grounds for assuming jurisdiction are the place where the contractual obligation should have been performed or the place where the breach of contract has occurred. It might be equally difficult to define where a contractual performance should take place or where a breach of contract occurs on the internet. Jurisdictional connecting factors using these criteria are equally difficult to apply in internet cases.

Under the CPR service out of the jurisdiction is also permissible where the claim is in respect of a breach of contract committed within England and Wales.¹⁴⁹⁴

Under Article 5 (1) (a) of the Jurisdiction Regulation¹⁴⁹⁵, one of the grounds for special jurisdiction in a contract claim is that the obligation at issue should have been performed in the place of the forum. Article 5 (1) (b) clarifies that for the sale of goods, this is the place where the goods have been or should have been delivered and for services that is place where the services have been or should have been provided.

In this context it might be difficult to determine the exact place of performance for the obligation under an e-commerce contract.

By way of illustration there are four arguable possibilities if the contractual obligation is to make available for downloading software:

(i) The location of the server which hosts the material being downloaded. This could be completely arbitrary and with no obvious connection to either party. By way of illustration, the provider of the software is a company incorporated and domiciled in France, the recipient a person domiciled in Luxembourg using an internet access provider domiciled in Belgium. The server hosting the software for downloading is located in Ireland. In such a situation it could be argued that since the contractual obligation is to make available the software, this has been performed in Ireland -albeit that this location is unconnected to the parties and could easily be moved (location being irrelevant for functionality).

(ii) The provider's domicile could also be the place of performance. Since it is from this location that the provider creates and uploads the software onto the server to make it accessible, arguably this may be regarded as the place of performance (France).

(iii) The recipient's internet access provider. Since the recipient's browser sends the request for the software and the software is initially received on a server

¹⁴⁹⁴ CPR 6.20 (6)

¹⁴⁹⁵ Council Regulation EC/44/2001- This Regulation harmonises the rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the EU, and applies according to Art.4 (1) where the defendant is established within the EU, see fn 1480

of the recipient's access provider, it could be argued that this is the place of performance (Belgium).

(iv) Finally, it could be the location of the recipient's desktop since this is where he actually downloads the software to (Luxembourg).

In the physical world principles have been worked out which determine, for example when a seller has to deliver the goods and when a buyer has to collect them. The problem is here that equivalent principles have not been worked out in the metaphysical internet world. As this example has illustrated it may be difficult to determine the place of performance or the place of breach of a contract, where the contractual performance is carried out over the internet.

2.2.2 Tort-ubiquitous effects

Since the internet can be accessed from anywhere in the world, the harm caused by an information tort committed on the internet may, in some cases at least, fall anywhere and everywhere.¹⁴⁹⁶

(a) The fear of being sued everywhere or in an unexpected location

Depending on the circumstances of the case, the harmful effects caused by the tort might be limited to just one location, for example in the case of negligent medical advice provided on the internet causing personal injury to a person domiciled in a particular jurisdiction or defaming a person who only has a reputation in one particular locality (usually his or her domicile). On the other hand information torts committed on the internet can cause damaging effects internationally, with the harm being spread over many different jurisdictions. An example for the latter would be defamation of a person with an international reputation (such as a famous actor, politician or celebrity), trade mark infringement on a website of a mark registered in several jurisdictions or negligently spreading a virus through a website, imparting that malicious code to anyone who happens to access the website and which consequently damages computer equipment located in many different jurisdictions.

Even where the harm resulting from the defendant's tortious activities *de facto* only occurs in one jurisdiction, the global reach of the internet can be troublesome for the unsuspecting defendant, who may be surprised at being hauled into a distant foreign court.

Arguably, this additional burden on the defendant is fair if it was foreseeable for the defendant that he or she would be hauled before the courts of that particular jurisdiction. But this may not be so on the internet. For example, if a French architect operates a website which is directed at local, French customers and this

¹⁴⁹⁶ H Kronke 'Applicable Law in Torts and Contracts in Cyberspace' in K Boele-Woelki, C Kessedjian (eds.) *internet Which Court Decides? Which Law Applies?* (Kluwer Law International The Hague 1998) 65-87, 65

website negligently carries a virus, which causes damage to the computer equipment of a Canadian user, should that Canadian user be able to sue in his/her local courts? This question arises not only because of the ubiquitous nature of the internet, but also because of the fact that most, even only local, businesses now have websites which can be accessed from anywhere in the world.

Thus the main fear of users interacting on the internet is that they can be sued in a potentially distant jurisdiction (or multiple such jurisdictions).¹⁴⁹⁷

From the claimant's point of view, the concern is whether he or she can sue at the place where he or she has suffered damage and whether any remedy can be enforced there.

As the rules on tort jurisdiction discussed in the next section demonstrate these fear are amply justified.

(b) Connecting factors: place of the commission of the tort and the place of damage

Looking at the connecting or localisation factors under the rules of Private International Law for tort, there are two logical possibilities. One connecting factor is the place where the harmful act was carried out, *ie* the place where the tort was committed. The other connecting factor is the place where the damage occurred.

In the EU if the defendant is domiciled in the EU, the EU Jurisdiction Regulation¹⁴⁹⁸ applies.¹⁴⁹⁹ If, on the other hand, the defendant is not domiciled in an EU or EEA state, the English courts apply the common law rules, now stated in the CPR. Both under the EU rules on jurisdiction and under the CPR (English common law) rules, the claimant can sue (at his or her choice) in either place.¹⁵⁰⁰

In an early case¹⁵⁰¹, *Bier v Mines de Potasse* the ECJ had to rule on the meaning of the phrase 'place where the harmful event occurred' in Article 5 (3) of the Jurisdiction Regulation. The ECJ held that the phrase 'place where the harmful event occurred' could refer to either the jurisdiction where the event giving rise to the damage occurred or to the jurisdiction where the damage itself occurred.¹⁵⁰² The relevant place under the EU harmonised rules is therefore either where the wrongful, tortious act was done or the place where the damage occurred.¹⁵⁰³

¹⁴⁹⁷ See the Law Commission's consultation in respect of online defamation- the main concern expressed was the potential risk of being sued on a global basis. Law Commission 'Defamation and the internet' Scoping Study No 2 December 2002, para 4.21

¹⁴⁹⁸ Council Regulation EC/44/2001 fn 1480

¹⁴⁹⁹ Art.4 (2)

¹⁵⁰⁰ L Collins *Dicey, Morris & Collins* fn 1484 388

¹⁵⁰¹ C-21 '76 *Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace* [1976] ECR 1735

¹⁵⁰² *ibid* para 19

¹⁵⁰³ L Collins *Dicey, Morris & Collins* fn 1484 388, 416-417

Under the CPR the relevant connecting factors are that either the damage was sustained within the jurisdiction¹⁵⁰⁴ or that the tortious act was committed within the jurisdiction¹⁵⁰⁵.

(c) The place where the tort was committed

As has been pointed out above, in the section about contracts, it can be difficult to pin down an activity, such as the commission of a tort, on the internet. If a tort is committed through the provision of information, is this the place, where the information is generated or accumulated, the place of uploading the information, the place where the information provider is physically located or legally established, the place where the server hosting the information is located or is it the place of downloading, as this is the place where the information is accessed and read?

As the High Court of Australia has appositely pointed out in the *Gutnick case*:

‘locating the place of a tort is not always easy. Attempts to apply a single rule of location (such as a rule that intentional torts are committed where the tortfeasor acts, or that torts are committed in the place where the last event necessary to make the actor liable has taken place) have proved unsatisfactory if only because the rules pay insufficient regard to the different kinds of tortious claims that may be made.’¹⁵⁰⁶

The answer to the question of where the tort was committed depends on the definition of the tort.¹⁵⁰⁷ For example if the tort is defined as using a trade mark in the course of trade¹⁵⁰⁸, or making a misrepresentation or misstatement¹⁵⁰⁹, the place of the commission of the tort will be different from the place if the tort is defined as publication¹⁵¹⁰.

¹⁵⁰⁴ CPR 6.20 (8) (a)

¹⁵⁰⁵ CPR 6.20 (8) (b)

¹⁵⁰⁶ *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 (High Court of Australia) para 43 (first judgment)

¹⁵⁰⁷ Furthermore, sometimes a tort may consist of several acts raising the problem of defining the relevant act. A good example for this is the case of *Ashton v Rusal* [2006] EWHC 2545 (Comm) para 62-64. In that case a Russian company ‘hacked’ into the computing system of a company in London and the court said that the tortious acts were committed in London on the basis that this was the place where the confidential information was stolen, where the ‘safe had been cracked’. One could also argue that the misuse of the information in Russia was the place where the tort was carried out. This case is an example where the Court found that the relevant acts were committed within the jurisdiction, even though the actor was outside the jurisdiction when acting.

¹⁵⁰⁸ S.10 Trade Mark Act 1994; here the defendant must trade in the forum, see also *Euromarket fn Designs Inc v Peters and Crate & Barrel Ltd* [2001] FSR 20 (ChD)

¹⁵⁰⁹ Such as negligent misstatement, where the tort is deemed to be committed at the place of origin of the communication, see the *Domicrest Ltd v Swiss Bank Corp* [1999] QB 548 (QB). However in other cases, the torts of negligent and fraudulent misrepresentation were found to be committed at the place of reception, see *L Collins Dicey, Morris & Collins* fn 1484 387

¹⁵¹⁰ See fn 1513

In other words, not all torts committed by information disseminated through the internet can be located by reference to the same action (such as uploading or downloading information) or by reference to the location of the same connecting factor (such as the server hosting the information, the establishment of the person producing the information, etc). Furthermore, even if a tort is defined in the same way, different courts may locate this activity in a different place.¹⁵¹¹

This can be illustrated by the example of defamation. Under EU law, the place where the tort of defamation was carried out is the place of publication, which has been held to be the place of the publisher's establishment in *Shevill*.¹⁵¹² This can be contrasted with the Australian/English approach which finds that, for defamation publication takes place where the information is read. A series of recent cases in the English and Australian courts have established that a text, which is accessible on the internet, is published at the place where it is downloaded.¹⁵¹³ However, it should be pointed out that an English court has recently held that there is no presumption that an article merely made available on the internet has been published in this jurisdiction. The mere fact that the article could have been accessed in England is not sufficient for the claimant to establish jurisdiction here.¹⁵¹⁴

(d) The place where the damage occurred

The second connecting factor is the place where the damage itself occurred. For example, the *Mecklermedia case*¹⁵¹⁵ illustrates the breadth of the assertion of jurisdiction on the ground of damage in the forum alone. Although on the facts of this case, the damage to *Mecklermedia's* reputation in the UK was mainly caused by the defendants' active marketing operations in the forum (England) and only partly by the mere dissemination of the information through the website, the case illustrates how two commercial organisations, operating in a similar field with the same name in *previously separate* territories and *different* jurisdictions are brought into conflict, when commencing the use of a website, accessibly in all jurisdictions. In such a scenario jurisdiction based on damage to reputation within the forum, caused by users in the forum accessing the defendant's website, is, to say the least, problematic, especially if the defendant had not targeted its conduct to the forum state.¹⁵¹⁶

¹⁵¹¹ See fn 1509

¹⁵¹² C-68/93 *Fiona Shevill v Presse Alliance SA* [1995] ECR I-415 paras 24-25

¹⁵¹³ *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 (High Court of Australia) para 98; *Harrods Ltd v Dow Jones & Company Inc* [2003] EWHC 1162 (QB) para 36; *Don King v Lewis Lennox* [2004] EWHC 168 (QB) paras 9-10, confirmed by the Court of Appeal in *Lewis Lennox v Don King* [2004] EWCA Civ 1329 (CA) para 2 and *Richardson v Schwarzenegger* [2004] EWHC 2422 (QB) para 19

¹⁵¹⁴ *Al Amoudi v Brisard* [2006] EWHC 1062 (QB) The Court made clear that there must be a platform of facts from which it can be inferred that publication in England was likely, para. 37

¹⁵¹⁵ *Mecklermedia Corporation v DC Congress GmbH* [1998] Ch 40 (Ch D)

¹⁵¹⁶ Although, according to the Court's findings, Mecklermedia was drumming up business from the UK, *ie* on the facts the Court found that the defendant was targeting its conduct to the UK. 42

However it also has to be pointed out that in two later cases¹⁵¹⁷ the English/Scottish court has indicated that for trade mark infringement and passing off mere access to a 'foreign' internet website by users in the proposed forum is not sufficient for a grant of jurisdiction, developing the law further from the *Mecklermedia* case discussed above.

Thus both under the English and the EU rules, it is sufficient that the damage has occurred within the jurisdiction. This has potentially far reaching consequences for internet torts, where, as has been argued above, the damage can occur in many jurisdictions or in a completely unexpected jurisdiction. Noteworthy is also that the English nor European approach does not necessarily require an 'intention' or foreseeability on the part of the defendant that the damage would occur in a particular location or jurisdiction and can be contrasted on this basis with the US approach.¹⁵¹⁸

The ECJ has held in *Shevill*¹⁵¹⁹ that if the damage had been spread over several Member States the claimant could sue in each and every jurisdiction in which he or she had suffered harm, *but only for the damage suffered in that particular jurisdiction*.¹⁵²⁰ If the claimant wishes to sue for the whole loss he or she has to bring an action in the courts of the place where the defendant carried out the tort¹⁵²¹ or where the defendant is established^{1522 1523}.

The rule for multi-state defamation actions is similar under the English common law. Here also the claimant can sue for defamation in each and every jurisdiction where the statement has been downloaded.¹⁵²⁴ As under the European rules, the claimant can only recover the damage suffered in that forum.¹⁵²⁵

This means the single publication rule applied in the US¹⁵²⁶ does not apply under EU or English law. In summary therefore a defendant can sue in each and every jurisdiction, where the immediate¹⁵²⁷ damage has occurred.

¹⁵¹⁷ *Euromarket Designs Inc v Peters and Crate & Barrel Ltd* [2001] FSR 20 (ChD) Para 21-25 contrast this decision with the decision of the US District Court for the Northern District of Illinois, which found jurisdiction in Illinois to hear the claim on the basis of minimum contacts established by the website: *Euromarket Designs Inc v Crate & Barrel Ltd and Peters* 96 F Supp 2d 824; and *Bonnier Media Ltd v Greg Lloyd Smith and Kestrel Trading Corporation* [2002] SCLR 977 Court of Session, Outer House Para 19-20

¹⁵¹⁸ See below 2.4.1

¹⁵¹⁹ C-68/93 *Fiona Shevill v Presse Alliance SA* [1995] ECR I-415

¹⁵²⁰ Para 29-33; under Art.5 (3)

¹⁵²¹ Under Art.5 (3) of Regulation EC/44/2001, which for defamation is the place of the publisher's establishment, see the discussion above.

¹⁵²² Under Art.2 (1) of Regulation EC/44/2001

¹⁵²³ *L Collins Dicey, Morris & Collins* fn 1484 418

¹⁵²⁴ *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 (High Court of Australia) para 98; *Harrods Ltd v Dow Jones & Company Inc* [2003] EWHC 1162 (QB) para 36; *Don King v Lewis Lennox* [2004] EWHC 168 (QB) paras 9-10, confirmed by the Court of Appeal in *Lewis Lennox v Don King* [2004] EWCA Civ 1329 (CA) para 2 and *Richardson v Schwarzenegger* [2004] EWHC 2422 (QB) para 19

¹⁵²⁵ *ibid*

¹⁵²⁶ See the discussion below 2.4.3

(e) Limitation of jurisdiction under *forum non conveniens* under the common law

Under the common law rules, courts may exercise their discretion to examine whether England is not the *forum conveniens* (appropriate forum).¹⁵²⁸ Under this test the courts take into consideration other places connected with the action.¹⁵²⁹ Essentially under the *forum non conveniens* doctrine¹⁵³⁰, the courts will consider¹⁵³¹ the connection of the claimant with the forum, *ie* in a defamation action, his or her reputation in the place of the forum¹⁵³², the location of the evidence and witnesses¹⁵³³ and whether the claimant would be barred from obtaining redress elsewhere if the court strikes out the proceedings.¹⁵³⁴

If publication in England is *de minimis* compared to the main place of publication, then the courts may also refuse to hear the case.

In *Chadha v Dow Jones* both claimant and defendant were resident in the US and the libel was published in a US magazine. The total distribution figures were 294,346, out of which 283,520 were sold in the US. Only 1257 were sold in the England. The court at first instance declined jurisdiction and the Court of Appeal¹⁵³⁵ confirmed this.

Furthermore in the Court of Appeal decision of 3. February 2005 in *Dow Jones & Co Inc v Yousef Abdul Latif Jameel*¹⁵³⁶ the allegedly defamatory material inferring that the claimant had supported Al Qaeda in 1988, contained in the online version of the Wall Street Journal was only accessed by five subscribers (including the claimant's lawyer). Jurisdiction had not been challenged in this case, so that the issue of *forum non conveniens* did not arise. Nevertheless the court struck out the proceedings as an abuse of process finding that 'the cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick'.¹⁵³⁷

¹⁵²⁷ The ECJ held in two cases that the claimant can only recover the direct damage, not any consequential harm: *Dumcz France v Hessische Landesbank* [1990] ECR I 49; *Marinari v Lloyds Bank plc* [1995] ECR I 2719

¹⁵²⁸ *The Spiliada* [1987] AC 460 (HL); *Berezovsky v Michaels* [2000] 2 AllER 986 (HL), [2000] EMLR 643, 662; *Lennox Lewis v Don King* [2004] EWCA Civ 1329 (CA)

¹⁵²⁹ *Lewis Lennox v Don King* fn 1513 paras 25-26 referring to *Diamond v Sutton* (1866) LR 1 Ex 130 and *Schapira v Ahronson* [1999] EMLR 735 (CA)

¹⁵³⁰ L Collins *Dicey, Morris & Collins* fn 1484 476

¹⁵³¹ All of these have been mentioned in *Schwarzenegger* fn 1513 para 24

¹⁵³² *Don King v Lewis Lennox* [2004] EWHC 168 (QB) para 17; *Berezovsky* fn 1528 651-652

¹⁵³³ Lord Goff in *The Spiliada* fn 1528, 479

¹⁵³⁴ *ibid* 475-476

¹⁵³⁵ [1999] EMLR 724 (CA)

¹⁵³⁶ [2005] EWCA Civ 75 para 69

¹⁵³⁷ *ibid*

Chadha and *Dow Jones* show that in extreme cases the courts in England are likely to strike out the claim because of *forum non conveniens* or as an abuse of process¹⁵³⁸. However this is only likely to happen in extreme cases. As several defamation cases have shown the English courts are slow to find that England is *forum non conveniens*: for example, in *Harrods Ltd v Dow Jones*¹⁵³⁹ the court (Mr Justice Eady) granted jurisdiction, even though ‘the evidence discloses a very small number of “hits” on the article as published on the web’. In *Lewis Lennox* the English courts had jurisdiction, even though all parties were all resident in the US.¹⁵⁴⁰ In *Schwarzenegger* the English court (Mr Justice Eady) assumed jurisdiction in a libel action brought by an English television presenter against the Californian Governor (and others), in statements made in the US during his election campaign, reported in an article by the Los Angeles Times (accessible on the internet).¹⁵⁴¹

Furthermore *forum non conveniens* does not apply where the defendant is domiciled in the EU and the Jurisdiction Regulation¹⁵⁴² applies.¹⁵⁴³ Thus if the court grants jurisdiction on the basis of the wide jurisdictional principles enunciated in *Bier* and *Shevill* it will have no discretion to stay proceedings on the grounds that another forum is more appropriate.¹⁵⁴⁴

This discussion of tort jurisdiction has shown that the rules on jurisdiction in the EU and under the common law are complex and for internet cases, unpredictable. Links such as damage within the jurisdiction and harm to reputation held there have been sufficient. For defendants, therefore it is likely that they may be sued in more than one jurisdiction or in an unexpected jurisdiction. Conversely for claimants there is often uncertainty as to which court has jurisdiction and considerably opportunity for forum shopping.

¹⁵³⁸ See also L Collins *Dicey, Morris & Collins* fn 1484 468

¹⁵³⁹ Fn 1513 para 4

¹⁵⁴⁰ Fn 1513

¹⁵⁴¹ Fn 1513

¹⁵⁴² Council Regulation 44/2000/EC fn 1480

¹⁵⁴³ L Collins *Dicey, Morris & Collins* fn 1484 472; C Clarkson, J Hill *The Conflict of Laws* (3rd ed Oxford University Press 2006) 59-60

¹⁵⁴⁴ C-412/98 *Group Josi Reinsurance Company SA v Universal General Insurance Company* [2000] ECR I-5925; for the Lugano Convention *Aiglon Limited v Gau Shan & Company Limited* [1993] 1 Lloyds Law Reports 164, 175; but the English Court of Appeal has held that it can still decide that England is not the appropriate forum if the conflict is between English jurisdiction and a non-EU state (such as between an English defendant and a US claimant): *In re Harrods (Buenos Aires) Limited* [1992] Ch 74 (CA); *ACE Insurance SA-NI v Zurich Insurance Co and Zurich American Insurance Co* [2001] 1 Lloyd's Rep. 618 (CA). However the ECJ has now explicitly ruled that if the defendant is domiciled in a EU Member State (including the UK) and the Jurisdiction Regulation applies, the English courts have no discretion to apply *forum non conveniens*, even where the conflict is with a non-EU jurisdiction (here Jamaica): C-281/02 *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)* Judgment of 1. March 2005 [2005] ILPr 25 (ECJ)

2.2.3 Consumers

One of the defining features of the European approach to private international law is that there are special rules for (some) consumer contracts.¹⁵⁴⁵ The policy behind special consumer jurisdiction rules is that the consumer is perceived as the weaker party to the contract.¹⁵⁴⁶

To counterbalance the consumer's *prima facie* weaker position, the harmonised EU rules on applicable law¹⁵⁴⁷ and jurisdiction¹⁵⁴⁸ provide for consumer protection.

(a) Asymmetrical jurisdiction rules

If the special consumer jurisdiction rules apply, a consumer is allowed to sue a foreign supplier in the local court of the consumer's domicile. In fact, the consumer has a choice: he or she can sue in the state of his or her own domicile or in the domicile of the supplier (to ensure enforcement, for example).¹⁵⁴⁹ But in the reverse, the supplier can *only* sue a defendant consumer in the consumer's local court.¹⁵⁵⁰ Hence the jurisdiction rules are asymmetrical in favour of the consumer. However, even if the consumer is able to sue 'at home' he or she would still have to enforce the judgment abroad.

(b) Applying (at least) consumer protection law mandatory in the consumer's residence

If the special consumer protection provisions apply, the supplier cannot contract out of provisions of substantive consumer protection law mandatory in the jurisdiction of the consumer's residence (*eg* regulation of unfair contract terms).¹⁵⁵¹ Mandatory rules are defined as those rules of a legal system which the parties cannot deviate from by agreement.¹⁵⁵² A provision of the chosen law is inapplicable *only* to the extent that it would deprive the consumer of the protection by the mandatory rules

¹⁵⁴⁵ Based on the EC Treaty (Treaty establishing the European Union ('Treaty of Rome') consolidated version incorporating the Maastricht and Amsterdam Treaties) Articles 3 (t) and 95 (3)

¹⁵⁴⁶ C-96/00 *Gabriel v Schlank and Schick GmbH* [2002] ECR I-6367 para 39; L Collins *Dicey, Morris & Collins* fn 1484 440, 1635

¹⁵⁴⁷ 1980 Rome Convention on the law applicable to contractual obligations of 26. January 1998, OJ C027 pp 34 -46

¹⁵⁴⁸ Council Regulation 44/2001/EC on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 22. December 2000 ('Jurisdiction Regulation') OJ 2001 L12 pp.1-23

¹⁵⁴⁹ Art.16 (1) Jurisdiction Regulation 44/2001/EC

¹⁵⁵⁰ Art.16 (2) Jurisdiction Regulation 44/2001/EC

¹⁵⁵¹ Art.5 (2) Rome Convention fn 1480; see also Art.6 (2) of Directive 93/13/EEC of 5. April 1993 on Unfair Terms in Consumer Contracts: 'Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States'.

¹⁵⁵² Art.3 (3) Rome Convention fn 1480, L Collins *Dicey, Morris & Collins* fn 1484 16-40, see also the discussion in 4-4.5

in his country of residence.¹⁵⁵³ In other words, in this situation, the applicable law is split: mandatory rules of the consumer's residence apply as a minimum *and* the law stipulated in the choice of law applies concurrently. The consumer's mandatory law only prevails if the consumer receives less protection under the chosen law.¹⁵⁵⁴

This will be reformed if and when the new draft Regulation on applicable law (Rome I) will be in force.¹⁵⁵⁵ Article 5 (1) makes no distinction between mandatory laws and non-mandatory laws and the applicable law will not 'split'. In other words, if there is a choice of law clause, it is either invalid and the consumer's law applies or it is valid, in which case the law of choice governs the contract.

At present, under the Rome Convention, the law of the country of the consumer's residence will completely govern the contract only if there is no express choice of law.¹⁵⁵⁶ This 'split' of the applicable law is cumbersome and will make litigation even more expensive.

(c) Applicability of the rules on consumer protection

The next question which must be examined is under what circumstances these private international law rules protecting consumers apply.

Applicable law under the Rome Convention

The consumer rules in the Rome Conventions apply to a contract for the supply of goods or services, where in the state of the consumer's domicile (a) the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising in that country *and* (b) the consumer took the steps necessary on his part for the conclusion of the contract in that country.¹⁵⁵⁷ Alternatively, the Rome Convention applies 'if the other party or his agent received the consumer's order in that country'.¹⁵⁵⁸

In *Gabriel v Schlank and Schick GmbH*¹⁵⁵⁹ the ECJ stated that 'the concepts of advertising and specific invitation addressed (...) cover all forms of advertising carried out in the Contracting State in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema or *any* other medium'. This would certainly include internet websites (or other internet applications) as a form of general advertising medium

¹⁵⁵³ Art.5 (2) Rome Convention fn 1480

¹⁵⁵⁴ L Collins *Dicey, Morris & Collins* fn 1484 1640: 'the correct interpretation of Art 5 (2) will enable the consumer to rely on the mandatory rules of the law of his habitual residence, if they are more favourable to him than the chosen law, or on the chosen law, if it is more favourable to him than the mandatory rules'

¹⁵⁵⁵ See Art.5 (1) Commission's Proposal for a Regulation on the Law Applicable to Contractual Obligations (Rome I) COM(2005) 650 final of 15. December 2005

¹⁵⁵⁶ Art.5 (3) fn 1480

¹⁵⁵⁷ Art.5 (2) of the Rome Convention fn 1480

¹⁵⁵⁸ *ibid*

¹⁵⁵⁹ See fn 1546 44

In *Rayner v Davies*¹⁵⁶⁰ the Court of Appeal stressed that these rules only apply in situations where the defendant had *actively* marketed his services in the consumer's jurisdiction. In this case the English claimant sued a defendant domiciled in Italy for an allegedly negligent survey of a yacht berthed in Italy. The claimant had travelled to Italy and all the negotiations for the survey contract had taken place there. The defendant surveyor then faxed a contractual offer for the survey contract to the claimant, which the claimant signed and returned by fax to the defendant from England. The Court of Appeal said that the appropriate test was to 'stand back from the factual scenario and ask who invited whom to do business'.¹⁵⁶¹ Thus the relevant test was whether the defendant had invited the claimant to do business in England. Here the Court found that the claimant had taken the initiative by going to Italy and that there was no jurisdiction.¹⁵⁶²

It is difficult to apply this test based on general advertising in the consumer's state to internet contracts, as websites (and other internet applications) can be accessed from anywhere and frequently it will be impossible to decide who invited whom to do business. At the Commission's public hearing on private international law and the internet there was a long debate, whether consumers' contracting through the web is akin to the consumer travelling abroad and visiting a shop there or whether it is akin to traders travelling to the consumer's place of residence to market and sell their products there.¹⁵⁶³ However this debate is inconclusive as these analogies are meaningless, since the whole point of the internet as a communications medium is that neither party has to travel. In a hypothetical scenario if the consumer concludes a contract for services through a form on a website, paying by credit card and while sitting at a desktop in his or her country of residence, the conditions in Article 5 (2) (advertising in the consumer's state of residence and consumer taking the steps¹⁵⁶⁴ to conclude the contract there) may well be fulfilled¹⁵⁶⁵, depending on how the courts locate the advertising in the specific case. It is suggested here that a more logical test may be whether the business has targeted or directed its services at consumers in that country, albeit that in practice this second test is not radically different.¹⁵⁶⁶ Furthermore, the difficulty with targeting is that the parameters of such

¹⁵⁶⁰ [2003] 1 All ER (Comm) 394 (CA)

¹⁵⁶¹ *ibid* para 26

¹⁵⁶² The defendant surveyor had some sort of website- this was a point which the claimant failed to exploit in his argument.

¹⁵⁶³ On 5. November 1999- the author attended this hearing on behalf of a client.

¹⁵⁶⁴ This was meant to the factual rather than legal steps to conclude the contract. see Giuliano-Lagarde Report on the Convention on the Law Applicable to Contractual Obligations OJ 1980 C282 p. 1, 24 and L Collins *Dicey, Morris & Collins* fn 1484 1639

¹⁵⁶⁵ R Schu 'The Applicable Law to Consumer Contracts Made Over the internet: Consumer Protection Through Private International Law?' 5 *International Journal of Law and Information Technology* 192-229, 215

¹⁵⁶⁶ The courts would ask themselves whether a business was directing its advertising to a particular state before finding that the business advertised in that state. A mere accidental availability of an advertisement in a state would probably not amount to 'advertising' there, Giuliano-Lagarde Report on the Convention on the Law Applicable to Contractual Obligations OJ 1980 C282 p.1, 24. However this issue is controversial, see the discussion in L Collins *Dicey, Morris & Collins* fn 1484 1638-1639

an equally general test are also unclear. This will be discussed in the next section, as this is the test which has been introduced by the Jurisdiction Regulation.

Applicability of the consumer protection rules under the Jurisdiction Regulation

The special consumer jurisdiction rules in the Jurisdiction Regulation now apply (inter alia¹⁵⁶⁷) if ‘(...) a person directs commercial or professional activities to the Member State of the consumer's domicile (or to several states including that Member State)’.¹⁵⁶⁸

As some authors point out, it may be sufficient for their application that consumers of a particular Member State are able to acquire goods and services through a website. This approach would mean that the consumer protection rules apply to all interactive, general audience websites.¹⁵⁶⁹

However, it is more likely that the courts, in assessing whether a business directs its activities to a particular Member State, would make an overall assessment of the website in question.¹⁵⁷⁰ It may take into account the nature and character of the website (eg the products sold), the language and currency used on the website¹⁵⁷¹, marketing activities of the business external to the website (or other internet application), such as advertisements in national print or televised media in the consumer's Member State, banner ads or pop-up advertising on other websites, which are clearly targeted at a particular Member State, and finally whether the website contains a genuine disclaimer.¹⁵⁷²

As can be seen from these criteria, targeting is a question of degree and it is unclear how much targeting is required for the special consumer protection provisions to apply. In particular the question arises whether there is a presumption that the business directs its activities to all (Member) States, if a business does not specify on its website to which Member States it sells and if the target states for its activities cannot be ascertained from the context.

Hence businesses contracting on the internet are concerned that they may be hauled into court in an unsuspected jurisdiction or even multiple such jurisdictions and this

¹⁵⁶⁷ They also apply to a contract for the sale of goods on instalment credit terms or any other form of credit made to finance the sale of goods, Art.15 (1) (a) – (b) of the Jurisdiction Regulation 44/2001/EC fn 1480

¹⁵⁶⁸ Art.15 (1) (c) of the Jurisdiction Regulation 44/2001/EC fn 1480

¹⁵⁶⁹ L Gillies ‘European Union: Modified Rules of Jurisdiction for Electronic Consumer Contracts’ (2000) 17 *Computer Law & Security Report* 395-398, 397; see also Recital 10 of the Proposed Rome I Regulation see fn 1581; C Clarkson, J Hill fn 1543 85; also mentioned in L Collins *Dicey, Morris & Collins* fn 1484 442 as a possible interpretation

¹⁵⁷⁰ The issue is controversial, but see the discussion in L Collins *Dicey, Morris & Collins* fn 1484 1642-1643 arguing that it is possible that the courts would adopt a targeting approach

¹⁵⁷¹ However, Recital 10 to the Proposed Rome I Regulation see fn 1581 (applicable law) expressly states that language and currency are not determinative (interpretation of the European Commission)

¹⁵⁷² See also FSA's regulatory approach as to when a person is directing financial services to the UK. similar criteria can be found in the FSA Handbook, Release 022, August 2003 Chapter 3 COB para. 3.3.6

concern is not wholly unjustified considering the general nature of the directing/targeting test and the dearth of jurisprudence clarifying the test.

The issue has provoked considerable debate. The suggestion that e-businesses are liable to be sued in every Member State has evoked great criticism from the business community on the basis that it would drive many SMEs¹⁵⁷³ out of business if they had to contend litigation in every Member State.¹⁵⁷⁴

On the other side of the argument it could be pointed out that the burden or risk of litigation in foreign EU Member States is a natural consequence concomitant with the benefits of access to an EU-wide consumer market.¹⁵⁷⁵

One solution to this conflict is increased use of Alternative Dispute Resolution (ADR)¹⁵⁷⁶ or Online Dispute Resolution (ODR)¹⁵⁷⁷. Interestingly, when the European Parliament was consulted on the draft Regulation, the European Parliament suggested tying the consumer jurisdiction provisions to ADR. The European Parliament suggested that service providers should have been able to contract out of the asymmetric rules on consumer jurisdiction if the supplier commits itself to co-operate in a specified ADR procedure.¹⁵⁷⁸ Hence EU policy makers actively acknowledge the use of ADR as one solution to the difficulty of cross-border litigation. This requires the development of standards for ADR and the development of suitable schemes as explained in the Model in Chapter 8¹⁵⁷⁹.

Another solution to this conflict is to find a way which alleviates the fear of businesses that they may be sued in unexpected court(s) without diminishing the protection given to consumers. This could be achieved by making business ask their customers where they are based and denying consumer protection if a consumer lies about his or her location. Hence, business could use simple technology such as a drop-down menu and block consumers from jurisdictions they do not wish to target. This would prevent them from contracting with consumers in jurisdictions they do not want to direct their services to. This seems the approach adopted in the proposed Rome I Regulation, which will be discussed next.

¹⁵⁷³ Small and Medium Sized Enterprises.

¹⁵⁷⁴ M Pullen 'EU's dangerous threat to e-commerce' September 1999 *Legal Week*; M Jordan 'Suffocating e-commerce at birth' December 1999/January 2000 *European Counsel* 15-17; M Powell & P Turner-Kerr 'Putting the E-in Brussels and Rome' (2000) 16 *Computer Law & Security Report* 23-27, 26

¹⁵⁷⁵ BEUC position paper, BEUC 183/99 'Consumer Rights in electronic commerce-Jurisdiction and applicable law on cross-border consumer contracts' of 8 October 1999; S Dutson S Dutson 'E-commerce-European Union' (2000) 16 *Computer Law & Security Report* 105-107, 107; G Russell G Russell 'E-commerce Law and Jurisdiction' December 1999 *Butterworths Journal of International Banking and Financial Law* 459-461, 459

¹⁵⁷⁶ See 4-3

¹⁵⁷⁷ See 5-2 and 5-3

¹⁵⁷⁸ Report of the European Parliament on the Proposal for the Council Regulation on Jurisdiction, A5-0253 '2000 Final, Rapporteur Diana Wallis, Art.17a, p. 21.

¹⁵⁷⁹ 8-2 and 8-3

Consumer protection under the new (Rome I) Regulation on the law applicable to contracts

The provisions of the Rome Convention will soon be replaced by a Regulation.¹⁵⁸⁰ Article 5 (2) of that Proposal¹⁵⁸¹ provides that the consumer's local law applies if the supplier directed its activities to the consumer's Member State, unless the supplier did not know where the consumer was resident and this ignorance was not due to the supplier's negligence. This wording however leaves open the extent and nature of the supplier's obligations to ascertain the location of its customers. Where the contract involves sending out goods to a delivery address and/or the business requires a billing address (as is the case for card payments), it would be difficult for the business to claim that it was not aware of the consumer's location. However, if the provider performs the contract by making files available for downloading, which are paid by a method not involving a billing address, the business may genuinely not know where its customers are located.

However from the wording of the draft Regulation it is not clear whether, if the supplier does not undertake any steps to ascertain the location of its customers, it could be regarded as being negligent, with the consequence that the consumer's law applies.

In addition to the consumer protection provisions discussed above, private international law is also affected by the control of unfair contract terms, which make the situation even more confusing.

(d) Unfair Terms in Consumer Contracts Directive

The Unfair Terms in Consumer Contracts Directive¹⁵⁸² provides that certain terms deemed unfair are not binding on consumers. This premise set by the Directive raises the question whether an express choice of jurisdiction can be unfair and thus not binding on consumers. Secondly if a choice of jurisdiction clause is not binding on the consumer, does this mean that the consumer can sue a supplier in the consumer's jurisdiction and/or challenge the jurisdiction of the supplier's local court on this basis?

The starting point for evaluating the unfairness of a term is Article 3 (1) of the Directive, which establishes three requirements¹⁵⁸³ before a term is deemed unfair. First the term must not have been individually negotiated with the consumer. The

¹⁵⁸⁰ The first reading in the European Parliament is pending (scheduled for October 2007), see <http://www.europarl.europa.eu/oeil/file.jsp?id=5301232> [14. September 2007]

¹⁵⁸¹ See the Commission's Proposal for a Regulation on the Law Applicable to Contractual Obligations (Rome I) COM(2005) 650 final of 15. December 2005

¹⁵⁸² Council Directive 93/13/EEC of 5. April 1993 on Unfair Terms in Consumer Contracts OJ L95 '29 of 21. April 1993, implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1999 SI1999/2083

¹⁵⁸³ See also *Director General of Fair Trading v First National Bank* [2000] QB 672 (CA) 686- this case has been further appealed to the House of Lords, but not on the general interpretation of the unfairness test.

Annex

burden of proof is on the business to show that a term is not a standard term and has been individually negotiated.¹⁵⁸⁴ Secondly it must be contrary to good faith. Thirdly, the term must cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

Examples in the Annex

The Annex to the Directive provides a non-exhaustive and merely indicative list of examples of clauses, which cause such an imbalance and are contrary to good faith. However Article 4 of the Directive also makes clear that all the circumstances must be taken into account, including the nature of the goods and services, on a case-by-case basis. Thus a term not listed can be adjudged to be unfair, whereas a term listed may be considered to be fair in the circumstances.¹⁵⁸⁵

The most relevant of the examples for unfair clauses listed in the Annex is that contained in (q), which is defined as 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy (...)'. While this example does not expressly mention jurisdiction clauses, arguably a requirement for the consumer to litigate in a foreign or far away court hinders his or her right to take legal action.¹⁵⁸⁶

There is also judicial support for this interpretation of the Directive. In *Océano Grupo Editorial SA v Murciano Quintero*¹⁵⁸⁷ a publishing company selling encyclopedia on instalment credit terms included in its standard contract terms with consumers, who were located in different regions of Spain, a clause providing for jurisdiction in the courts at its place of business in Barcelona. Some consumers defaulted on the instalment terms and the company brought recovery proceedings in its local court. In that case, the ECJ in a preliminary ruling decided that an exclusive jurisdiction clause in a consumer contract falls within the example listed under (q) in the Annex.¹⁵⁸⁸ The ECJ argued that, since the value of the claim is likely to be small, meaning that the legal costs are disproportionate, consumers may be unable to enter an appearance. Furthermore, depending on the facts the clause may cause a significant imbalance between the parties, contrary to the requirement of good faith if as here, the supplier can bring and defend proceedings conveniently at its place of business, whereas the consumer has to do so at a distance.¹⁵⁸⁹

¹⁵⁸⁴ Art.3 (2) of Directive 93/13/EEC

¹⁵⁸⁵ GH Treitel fn 1491-274; D Oughton & J Lowry *Consumer Law* (2nd ed Blackstone London 2000) 400; R Stone *The Modern Law of Contract* (5th ed Cavendish London 2002) 252

¹⁵⁸⁶ Para 17.4 Unfair Contract Terms Guidance, published by the Office of Fair Trading in February 2001 and available on their website

<<http://www.oft.gov.uk/Business/Legal+Powers/Unfair+Terms-in+Consumer+Contracts/unfair-guidance.htm>> [14. September 2007]

¹⁵⁸⁷ Joined Cases C-240-244/98 [2000] ECR I-4941

¹⁵⁸⁸ See para 22; Advocate General Saggio pointed out that even if it did not fall within the Annex, Member States can add new categories, A17

¹⁵⁸⁹ See para 23-24; Advocate General Saggio, A18

Similarly in an English case, *Standard Bank London Limited v Apostolakis*¹⁵⁹⁰ the validity of a non-exclusive jurisdiction clause was at issue, allowing the Bank to sue their Greek clients at the Bank's place of business in England or any other jurisdiction where the clients had assets, whereas the consumer-clients were limited to suing before the English court. The Court found that the special rules on consumer jurisdiction in the Brussels Convention¹⁵⁹¹ applied and that therefore Mr and Mrs Apostolakis could only be sued in Greece and were themselves entitled to bring an action in the courts of their domicile, Greece.¹⁵⁹² However the Court *obiter* remarked that it would also consider the clause to be unfair under the Directive.¹⁵⁹³ The clause caused a substantial imbalance in that the consumers would be put to substantial inconvenience and cost to sue in England, whereas the Bank could sue at its place of business or at the place where a judgment would have to be enforced.¹⁵⁹⁴

Good Faith

Since there is no general all-embracing principle of good faith in English law, this is a novel concept for English trained lawyers.¹⁵⁹⁵ On the other hand as *Lord Bingham* in the *First National Bank* case has pointed out:

'Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice.'¹⁵⁹⁶

Lord Bingham summed up the good faith requirement as one of fair and open dealing.¹⁵⁹⁷

It seems that the 'good faith' requirement in Article 3 (1) of the Directive has both a procedural and a substantive element. The procedural requirement is that the consumer is dealt with openly and that the terms are sufficiently drawn to his or her attention, so that they do not take the consumer by surprise. However the fairness test in the Directive goes beyond transparency requirements. *Lord Steyn* in the *First National Bank* case¹⁵⁹⁸ cites *Hugh Collins* with approval that 'the test of significant imbalance of the obligations obviously directs attention to the substantive

¹⁵⁹⁰ [2001] Lloyd's Rep Bank 240 (QB); by contrast in *Westminster Building Company Ltd v Beckingham* [2004] All ER (D) 343 (Feb) (Technology and Construction Court) the court upheld an adjudication clause (not a jurisdiction clause) on the basis that it was not unfair in the circumstances. *inter alia* because the consumer had been professionally represented. see 7-2.2

¹⁵⁹¹ Fn 1480

¹⁵⁹² [2001] Lloyd's Rep Bank 240 (QB) Para 42

¹⁵⁹³ Para 51

¹⁵⁹⁴ Para 49

¹⁵⁹⁵ R Goode *Commercial Law* (2nd ed Penguin London 1995) 101-102, 105; D Oughton & J Lowry *Consumer Law* (2nd ed Blackstone London 2000) 404; R Stone fn 1489 250

¹⁵⁹⁶ *The Director General of Fair Trading v First National Bank* [2002] 1 AC 481 (HL) para 17

¹⁵⁹⁷ *ibid*

¹⁵⁹⁸ *ibid*

unfairness of the contract¹⁵⁹⁹. *Lord Steyn* makes clear that the examples listed in the Annex show that fairness is not limited to a procedural test of ensuring that the terms were properly drawn to the consumer's attention: 'any procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected'.¹⁶⁰⁰ Likewise, *Lord Bingham* has pointed out that it is a composite test, 'covering both the making and the substance of the contract'.¹⁶⁰¹

Some authors have criticized this incorporation of substantive consumer fairness into English law.¹⁶⁰² However the position under the Directive clearly is that substantive factors must be included into the evaluation. The issue is not only that the consumer makes a well-informed, but also a *free* choice, as the consumer's inferior bargaining position frequently means that he or she can only choose between different suppliers offering all the same standard clauses. It was this market failure which the Directive was designed to address.¹⁶⁰³

Causing a significant imbalance

A more interesting question is whether an exclusive jurisdiction clause in favour of the supplier's domicile is to be considered unfair if the special jurisdiction rules contained in Articles 15-17 of the Jurisdiction Regulation do *not* apply.¹⁶⁰⁴ By way of illustration, assume a Spanish consumer contracts with a provider domiciled in England for a survey of a house situated in London. The contract has been entered into via the world-wide-web or email¹⁶⁰⁵ and contains the surveyor's standard term and conditions incorporating a jurisdiction clause which provides for the exclusive jurisdiction of the English courts. The Spanish consumer alleges that the survey has been carried out negligently and wishes to sue the surveyor in Spain. *If* the jurisdiction clause was considered unfair it would not be binding on the consumer. However this would not automatically entitle the consumer to sue in Spain. Under the Jurisdiction Regulation the consumer could sue in the defendant's domicile¹⁶⁰⁶ (England) or the place where the services were to be provided¹⁶⁰⁷ (also England). Thus, in this specific example the Spanish consumer would nonetheless have to sue

¹⁵⁹⁹ Para 37; H Collins 'Good Faith in European Contract Law' (1994) 14 *Oxford Journal of Legal Studies* 229-268

¹⁶⁰⁰ Fn 1596 para 36

¹⁶⁰¹ Para 17

¹⁶⁰² C Withers 'Jurisdiction clauses and the Unfair Terms in Consumer Contracts Regulations' [2002] *Lloyd's Maritime and Commercial Law Quarterly* 56-65, 61

¹⁶⁰³ Office of Fair Trade Briefing August 2000 2. available from

<<http://www.offt.gov.uk/Business/Legal+Powers/Unfair+Terms+in+Consumer+Contracts/unfair-guidance.htm>> [14. September 2007]

¹⁶⁰⁴ Regulation EC/44/2001; this issue did not arise in *Apostolakis* or in *Océano*, so there is no direct authority on this point.

¹⁶⁰⁵ Assuming, of course that the supplier did not direct its activities to Spain, which is a factual assessment, which in this fictional scenario could be based on the fact that the website was in English, referred to prices in £ Sterling and stated expressly that the services were limited to properties situated in England and Wales.

¹⁶⁰⁶ Art.2 (1)

¹⁶⁰⁷ Art.5 (1) (b)

in the supplier's jurisdiction. For this reason one could argue that the jurisdiction clause does not *cause* a power imbalance between the parties in this scenario and is therefore not unfair.

This situation is changed if, without the jurisdiction clause in the contract, the Jurisdiction Regulation allows the consumer to litigate in his or her own local court. The consumer can litigate locally, *eg* where the obligation in question should have been performed in the consumer's jurisdiction under Article 5 (1). Such a case may arise, *eg* where goods are delivered to the consumer's address or services have to be preformed in the consumer's jurisdiction.¹⁶⁰⁸ In that scenario, a valid jurisdiction clause providing for the exclusive jurisdiction of the courts of the supplier's domicile would *cause* a power imbalance between the parties. This raises the question whether such a clause should be deemed unfair and therefore non-binding on the consumer, even though the jurisdiction clause is valid under the consumer protection provisions of the Jurisdiction Regulation¹⁶⁰⁹. It is only here that the Jurisdiction Regulation and the Unfair Contracts Directive clash.

Christopher Withers emphasises in his article the clear policy of the harmonised rules on jurisdiction to recognise as valid jurisdiction clauses subject only to narrow exceptions.¹⁶¹⁰ However this argument overlooks that there is a genuine clash between the Directive and the Regulations.¹⁶¹¹

It is questionable which instrument takes precedence as *lex specialis*. The Jurisdiction Regulation provides in Article 67 that it does not prejudice the application of Community provisions governing jurisdiction in specific matters. It is doubtful, though, that the Directive can be described as 'governing jurisdiction'.¹⁶¹² In turn, the Directive provides in Article 1 (2) that contractual terms which reflect mandatory regulatory provisions are not subject to the Directive (and its fairness test). This provision does not give much guidance either, as a jurisdiction clause is not a mandatory regulatory provision- there is no obligation for the parties to include a jurisdiction clause in their contract.¹⁶¹³

¹⁶⁰⁸ Presumptions in Art.5 (1) (b), albeit that it is difficult to think of a factual example where the supplier was not directing its activities to the consumer's Member State, but nonetheless had to perform the contractual obligation in the consumer's state. An example could be a business delivering to the consumer's jurisdiction by way of exception, *eg* where the website through which the contract is concluded is clearly operated by a local business in another jurisdiction, but by way of exception that business undertakes to deliver to the consumer's foreign address.

¹⁶⁰⁹ Assuming that the Jurisdiction Regulation, Articles 15-17 do not apply and Art.23 (1) applies.

¹⁶¹⁰ See fn 1602 64-65 and see the special rules on consumer jurisdiction in Articles 15-17 in the Regulation discussed above, insurance in Articles 8-14 and employment Articles 18-21

¹⁶¹¹ The OFT Guidance fn 1586 para 17.4 avoids this difficult issue by merely referring to international conventions and the Brussels Convention and saying that jurisdiction clauses which are contrary to the consumer provisions in these international conventions, are unenforceable for that reason, too. But it does not state what the position is where the Directive/Regulations clash with the jurisdiction provisions.

¹⁶¹² See also (agreeing) C Withers fn 1602 64-65

¹⁶¹³ See also GH Treitel fn 1491 276: 'the use of the word "mandatory" in the Regulations seems to mean that the exception in them does not extend to provisions which are merely authorised but not required by other legislation'.

However Article 1 (2) of the Directive also provides that it does not apply to contractual terms reflecting provisions or principles of international conventions, to which the Member States are party. This is wider than the first exception, applying to both general principles and concrete provisions.¹⁶¹⁴ At the time the Directive was negotiated and entered into force, the relevant rules on jurisdiction were contained in such an international convention, namely the Brussels Convention. Hence it could be argued that a clause containing the parties' choice of jurisdiction and recognised according to the Brussels Convention would not be subject to the unfairness test.

However, now, the Brussels Convention has been superseded by a Community instrument, the Jurisdiction Regulation EC/44/2001¹⁶¹⁵, so that the question of the conflict between the harmonised rules on jurisdiction on the one hand, and the harmonised rules on consumer protection, on the other, is a conflict *within* Community law, and not a conflict between international treaty law and Community law. Ultimately the solution to this conflict is not clear.

Summary

Therefore, in certain circumstances, a jurisdiction clause may amount to an unfair term, not binding on the consumer if the requirements of the Directive are fulfilled. However whether this is the case where the Directive and the Regulation clash is not clear. Ultimately it is an open question whether the Directive or the Regulation are the *lex specialis*. It is unclear whether or not the policy expressed in the Directive to protect consumers against unfair terms in standard contracts should supersede that of the Jurisdiction Regulation, *ie* that jurisdiction clauses should be valid unless they fall within the exceptions narrowly tailored in the Jurisdiction Regulation.

2.3 Conclusion

Having discussed consumer protection through Private International Law in the EU and England it can be concluded that these provisions are very complex. Furthermore, business' fear that they may be sued in an unexpected location or in multiple locations is justified. If a business has directed its activities to the consumer, a consumer may choose to pursue a claim in his or her own jurisdiction, but may nevertheless have to enforce a judgment abroad. For small claims, whether it is the business or the consumer who has to litigate and enforce in a foreign jurisdiction, the costs may not be proportionate to the claim. For this reason, ADR or ODR may be the only way forward for such claims. This will be discussed

¹⁶¹⁴ Ibid 277

¹⁶¹⁵ The EU received new competencies in the field of judicial co-operation in the Amsterdam Treaty. Therefore under Art.65 of the EC Treaty it was empowered to cloth the update of the Brussels Convention into a Regulation, thus obviating the need for ratification by all Member States

below. However, first, by way of comparison the US approach to jurisdiction will be considered.

2.4 The US approach to jurisdiction

2.4.1 The due process tests

A state or federal court in the US is constrained in exercising jurisdiction over an out-of-state defendant by the due process clause contained in the Fifth¹⁶¹⁶ and Fourteenth¹⁶¹⁷ Amendments of the US Constitution which provide in their essential parts that no person shall be deprived of life, liberty or property without due process of law. The due process clauses have been interpreted to impose a requirement that the out-of-state defendant must have minimum contacts with the forum and that the exercise of jurisdiction must be in accordance with traditional notions of fair play and substantial justice.¹⁶¹⁸

These principles have subsequently been interpreted by the various courts. In addition some states in the US have passed long-arm statutes establishing a list of grounds for the exercise of jurisdiction over out-of-state defendants, however in many states the long-arm statute is simply co-extensive with, *ie* as wide as, the due process principle.

The first test of ‘minimum contacts’ is satisfied if the defendant purposefully avails itself of the privilege of conducting business in the forum state or if it is foreseeable that he or she would be hauled into court there as a consequence of harmful activities intentionally directed at the forum state.¹⁶¹⁹ In tort cases the courts have established minimum contacts on the basis of the ‘effects doctrine’. This is not in fact (as the epithet may be taken to imply) jurisdiction based on mere effects but requires intent and knowledge on the part of the defendant. The defendant must have committed an intentional tort expressly aimed at the forum state, the harm caused thereby was suffered in the forum state and the defendant knew that this would be the case.¹⁶²⁰ For example, in *Panavision v Toeppen* Mr Toeppen registered the plaintiff’s trade marks as domain names and offered to sell them to the plaintiff. The Court found that the defendant had directed its actions to the plaintiff’s main place of business and knew that the brunt of the harm would be suffered there.¹⁶²¹

For the second part of the constitutional due process test, the test of traditional notions of fair play and substantial justice, the courts take into account the appropriateness of the forum (in terms of location of the evidence and the witnesses) and the interests of the respective competing jurisdictions in

¹⁶¹⁶ Applying to the federal government

¹⁶¹⁷ Applying to States

¹⁶¹⁸ In the seminal decision of *International Shoe Company v Washington State* 326 US 310, 316; 66 S Ct 154 (1945)

¹⁶¹⁹ *Calder v Jones* 465 US 783 (1984) 788-90

¹⁶²⁰ *Calder v Jones* 465 US 783 (1984) 788-90; *Panavision v Toeppen* 141 F 3d 1316, 1321 (1998)

¹⁶²¹ *ibid*

adjudicating the dispute. In internet cases more emphasis seems to be placed on the first test, so this discussion is mainly focused on minimum contacts.

Two distinctions from the European approach should be noted. First, unlike the European approach, the minimum contacts test has an intentional element, which is sometimes expressed as purposeful availment or knowledge that the defendants' actions would take effect in the forum.¹⁶²² This intentional element theoretically limits the jurisdictional reach. By contrast, in tort cases, under the European approach taken in the Brussels Convention and the Jurisdiction Regulation¹⁶²³ as interpreted in *Bier*¹⁶²⁴ the courts of the country where the claimant suffered direct physical harm are competent to adjudicate on the dispute, even if the defendant does not conduct business there or did not direct its activities to that state.¹⁶²⁵ Thus, the intentional element is missing from the European approach.¹⁶²⁶

For example, in *World-Wide Volkswagen* the US Supreme Court held that the claimants who had been injured in a car accident in Oklahoma, could not sue the retailer of the car there, as the retailer carried on 'no activity whatsoever in Oklahoma'.¹⁶²⁷ The Court said that although in theory it was foreseeable to the defendants that the claimants might take the car to Oklahoma, this theoretical foreseeability was not sufficient.¹⁶²⁸

By contrast, in *Asahi* a narrow majority of five out of nine judges of the US Supreme Court held that a manufacturer who regularly distributes a product through various distribution chains, knowing that a certain quantity of its product is likely to end up with consumers of a particular state, has the requisite minimum contacts with that state to be sued there in a personal injury action.¹⁶²⁹ It is difficult to reconcile *World-Wide Volkswagen* with *Asahi*, as arguably it was also foreseeable in the former case that some of the cars sold in New York might be driven to Oklahoma, albeit that in *World-Wide Volkswagen* the defendant was the retailer of the product, who sold directly to the consumer and not a large-scale manufacturer who distributes a mass-market product down a chain of sales.

In a recent internet case a US Federal District Court in California held that it had jurisdiction to decide a copyright infringement suit against Sharman Networks Ltd, headquartered in Australia and incorporated in the Pacific Island of Vanatu

¹⁶²² S Nauss Exon 'A New Shoe is Needed to Walk through Cyberspace Jurisdiction' (2000) 11 *Albany Law Journal of Science and Technology* 1-55, 5

¹⁶²³ See fn 1480

¹⁶²⁴ See fn 1501

¹⁶²⁵ See also above, the English common law rules allow for the claimant to sue before the English courts if he sustained damage in England CPR 6.20 (8) (a)

¹⁶²⁶ See above 2.2

¹⁶²⁷ *World-wide Volkswagen Corporation v Woodson* 444 U.S. 286, 287, 100 S.Ct. 559

¹⁶²⁸ *ibid*

¹⁶²⁹ Albeit that a majority held that it would constitute a violation of due process for California to exercise jurisdiction in the circumstances (the claim was between a Japanese and a Taiwanese company). *Asahi Metal Industry Co v Superior Court of California* 480 US 102, 107 SCt 1026

concerning decentralised peer-to-peer file sharing software such as Kazaa.¹⁶³⁰ The Court said that there was evidence that the Kazaa software had been downloaded 143 million times (and 20 million times in the US). Although there was no direct evidence as to how many times the software had been downloaded in *California* the Court extrapolated a likely figure of two million from the total number of downloads. This was sufficient for a finding of the required minimum contacts with California.¹⁶³¹ This is a similar approach as in the stream of commerce cases such as *Asahi*.

Thus in some cases the purposeful availment or foreseeability requirement has been interpreted widely requiring little in terms of purposeful availment and hence leading to a wide assumption of jurisdiction.

Hence, the principled approach to conflicts of law in the US is inherently more flexible, which makes an assertion of jurisdiction by the courts easier.

2.4.2 Principles developed in internet cases

Despite this flexibility, an examination of the defendant's contacts with the forum requires an analysis of the internet transaction or activity through the lens of territoriality, as it requires the answering of questions such as did the defendant do business in the forum or was it foreseeable that the defendant's actions cause harm to the claimant in the forum. Again, because of the difficulty of pinpointing activities and because of the ubiquity of access to the internet these questions are difficult to answer and the case law has produced contradictory outcomes on similar facts. The question of jurisdiction is therefore highly opaque and uncertain or as *Susan Nauss Exon*¹⁶³² has put it:

'The district court decisions appear to be highly individualistic and fact dependent. The result appears to be dragging jurisprudence deeper into a quagmire of uncertainty in how to confer personal jurisdiction in cyberspace.'

Contrast for example the *Euromarket* case discussed above with *Millenium*.

In *Euromarket* the plaintiff alleged trade mark infringement against the defendant, an Irish retail business with one shop in Dublin who used the same name as the plaintiff, 'Crate & Barrel' as a domain name, on its packaging and on its website.¹⁶³³ The US District Court found that the defendant had the required minimum contacts in Illinois, taking into account the defendant's non internet related contacts, such as her participation in trade fairs and one sale to a person with an Illinois billing address, even though the goods ordered were delivered to an

¹⁶³⁰ *Metro-Goldwyn-Mayer Studios Inc et al v Grokster et al* 243 F Supp 2d 1073 (CD California 2003)

¹⁶³¹ *ibid* 1087

¹⁶³² Fn 1622 26

¹⁶³³ *Euromarket Designs Inc v Crate & Barrel Ltd et al* 96 F Supp 2d 824 (ND Illinois 2000)

address in Ireland and even though this sale was ‘provoked’ by the plaintiffs’ lawfirm.¹⁶³⁴

In *Millenium*¹⁶³⁵ one music retail store in Oregon sued another in South Carolina for trade mark infringement and unfair competition. The South Carolina music shop made a small number of CD sales through its website, one of which had been made to Oregon (again arranged by the plaintiff’s lawfirm) and it had some non-internet related contacts in Oregon.¹⁶³⁶ Nevertheless the Court found that there were insufficient contacts with Oregon and dismissed the suit for lack of jurisdiction.¹⁶³⁷

As in Europe, mere access to a website as such is not sufficient to subject a party domiciled in one state to jurisdiction in another.¹⁶³⁸ However in *Compuserve v Patterson*, the Sixth Circuit Court of Appeals found that *electronic* contacts can constitute the required minimum contacts with the forum jurisdiction.¹⁶³⁹ Mr Patterson used Compuserve’s services to distribute shareware software and he alleged trade mark infringement and unfair competition by Compuserve. Since he had electronically registered as a shareware provider with Compuserve, based in Ohio¹⁶⁴⁰, and repeatedly uploaded software onto their system, the Court of Appeals for the Sixth Circuit found that the courts in Ohio had jurisdiction to hear Compuserve’s action for declaratory relief that it had not infringed Mr Patterson’s rights.¹⁶⁴¹

A frequently cited case in internet jurisdiction decisions is the 1997 US District Court case of *Zippo*¹⁶⁴² which established the influential, so-called sliding scale test, whereby jurisdiction depends on the degree of interactivity of a website. Under this test¹⁶⁴³, jurisdiction is contingent on the nature and quality of commercial activity that an entity conducts over the internet. Websites that only make information available are categorised as passive and access to such a passive website is not a sufficient ground for the exercise of jurisdiction. By contrast an active website, conducting business with residents in the forum state over the internet, would be sufficient for a finding of jurisdiction. The middle ground is occupied by interactive websites, which allow a user in the forum state to exchange information with a host computer. For these middle ground websites the exercise of jurisdiction is only

¹⁶³⁴ Fn 1633 829, 835

¹⁶³⁵ *Millenium Enterprises Inc v Millenium Music* 33 F Supp 2d 907 (D Oregon 1999)

¹⁶³⁶ *ibid* 909

¹⁶³⁷ *ibid* 920-924

¹⁶³⁸ *Cybersell Inc v Cybersell Inc* 130 F 3d 414 (9th Cir 1997) 419-420

¹⁶³⁹ *Compuserce Inc v Richard S Patterson* 89 F 3d 1257 (6th Cir 1996)

¹⁶⁴⁰ The click-wrap agreement made clear that Compuserve was based in Ohio and that the contract was deemed to be made there, *ibid* 1260-1261

¹⁶⁴¹ *ibid* 1264-5, 1269

¹⁶⁴² *Zippo Mfg Co v Zippo Dot Com Inc* 952 F Supp 1119 (WD Pa 1997)

¹⁶⁴³ An example for the application of *Zippo* is *Mink v AAAA Development LLC* 190 F 3d 333 (5th Cir 1999) orders were not taken through the website, but the website contained a printable order form, toll-free telephone number and a email address- this was not sufficient interactivity 337

proper if there is a high degree of interactivity and if the nature of the information exchange is commercial.¹⁶⁴⁴

It is important to keep in mind that the *Zippo* sliding scale test is only a frequently cited test established by a US District Court. It cannot overrule or replace the minimum contacts test.¹⁶⁴⁵ In fact it could be argued that the distinction between passive and active websites as a determinative factor is now technologically obsolete as very few websites are merely passive showcases of information.¹⁶⁴⁶ Recent decisions have placed more emphasis on targeting¹⁶⁴⁷, ie on whether the defendant has purposefully directed its activities to the forum. Judge Barbara B Crabb in *Hy Cite* severely criticised the *Zippo* test:

‘First, it is not clear why a website’s level of interactivity should be determinative on the issue of personal jurisdiction (...) Even a “passive” website may support a finding of jurisdiction if the defendant used its website intentionally to harm the plaintiff in the forum state (...) Similarly, an “interactive” or commercial website may not be sufficient to support jurisdiction if not aimed at the residents in the forum state.’¹⁶⁴⁸

Likewise, in the *Step Two* case the Third Circuit Court of Appeals emphasized that mere interactivity is not sufficient, but that the defendant must have intentionally directed its conduct at the forum state:

‘The *Zippo* court similarly underscored the intentional nature of the defendant’s conduct vis-à-vis the forum state (...) Since *Zippo* several district court decisions from this Circuit have made explicit the requirement that the defendant *intentionally* interact with the forum state via the web site in order to show purposeful availment...’¹⁶⁴⁹

However, other courts still rely on degrees of interactivity as set out in *Zippo*.¹⁶⁵⁰ For example, in *Mar-Eco* the court found that a vehicle dealer in Pennsylvania could sue a vehicle dealer in Maryland in their local court on the basis of contacts to the forum established by an interactive website.¹⁶⁵¹

2.4.3 Jurisdiction in defamation cases

In the US, the single publication rule, well- established in many US states, means that an action in respect of the same defamation can only be brought once and if the

¹⁶⁴⁴ *Zippo* fn 1642 1124

¹⁶⁴⁵ *Hy Cite Corporation v BadBusinessBureau.com* [2004] WL 42641 (WD Wis) 5

¹⁶⁴⁶ M Geist ‘Is There A There There? Toward Greater Certainty For Internet Jurisdiction’ (2001) 16

Berkeley Technology Law Journal 1345-1407 (1404); S Nauss Exon fn 1622 24. 35

¹⁶⁴⁷ *ibid*

¹⁶⁴⁸ See fn 1645 5

¹⁶⁴⁹ *Toys R US Inc v Step Two* SA 318 F 3d 446 452

¹⁶⁵⁰ For example *Mar-Eco v T&R and Sons Towing and Recovery* 837 A 2d 512 (Pa Super 2003) 517-518

¹⁶⁵¹ In that case the Court even found that it had general jurisdiction over the defendant, *ibid*

court accepts jurisdiction, it will consider the total loss to reputation alleged by the claimant.¹⁶⁵² This can be contrasted with the EU approach discussed above.¹⁶⁵³ At first sight the approach in *Shevill* seems more generous, as the claimant can bring several actions in respect of the same facts against the same defendant. However it is costly and burdensome for a claimant to bring several actions in different jurisdictions.

On the other hand, under *Shevill* the claimant can recover damages for the whole loss only in the courts at the publisher's establishment. In this respect, the US approach, based on minimum contacts and targeting is more generous, as the claimant is not limited to suing at the publisher's establishment, but can bring an action for the *whole* loss in any place where the due process criteria are satisfied.¹⁶⁵⁴ Hence the claimant can recover the whole loss in several fora not just at the place where the publisher is established.

Nevertheless in a conflict between US and English jurisdiction, most claimants prefer the English courts. However this is not motivated by any jurisdictional rules, but due to a more claimant friendly *substantive* defamation law, as in the US many defamation actions are defeated by the 'public figure' doctrine, which makes it harder for a famous person to bring an action against a media defendant.¹⁶⁵⁵ This will not be further discussed, as substantive defamation law is clearly outside this thesis. It suffices to say that private international law rules only suspend rather than solve the differences in the laws of different jurisdictions.

¹⁶⁵² *US Restatement of Torts* 2d (1977) § 577A

(2) A single communication heard the same time by two or more third persons is a single publication.

(3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.

(4) As to any single publication

(a) only one action for damages can be maintained;

(b) all damages suffered in all jurisdictions can be recovered in the one action: and

(c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.

¹⁶⁵³ 2.2.2 (d)

¹⁶⁵⁴ See in particular *Keeton v Hustler Magazine Inc* 465 US 770 (1984). Initially the single publication rule came to be associated with statements that the single publication took place where the newspaper or magazine was published: *Fried, Mendelson & Co v Edmund Halstead Ltd* (1922) 196 NYS 285, 287. This was then taken to mean that the applicable law should be that of the place of publication: *Zuck v Interstate Publishing Corp* 317 F 2d 727, 734 (2nd Cir 1963) and *Restatement of the Conflicts of Laws* 2d (1971) § 150. However, a plaintiff can sue in other jurisdictions than that of the place of publication

¹⁶⁵⁵ *New York Times v Sullivan* 376 US 254 (1964) and *Gertz v Robert Welch Inc* 418 US 323 (1974)-no public figure may recover without a showing of actual malice- this rule of substantive defamation law causes conflict in international cases. This is especially the case where the claimants argue that the law of England or that of Australia should apply, both of which are more generous to the claimant. However this conflict can not be solved on the level of jurisdictional rules. See also the Law Commission Report fn 1497 4.24: 'Writing in the Sydney Law Review David Rolph has argued that the defendants' arguments in *Gutnick* were "effectively seeking to entrench American libel law as the applicable law for the determination of internet defamation proceedings"'.

2.4.4 Consumers

Another major conceptual difference between the approach to jurisdiction in the EU and the US is that there is no overarching policy against jurisdiction clauses in consumer contracts in the US.¹⁶⁵⁶ The general principle in the US is that a forum selection clause is enforced unless it is fundamentally unfair.¹⁶⁵⁷ However, the mere existence of a jurisdiction clause is not decisive of the issue of jurisdiction. If the defendant can show that the jurisdiction clause was obtained through fraud, undue influence or overweening bargaining power, or if it is against a state's strong public policy, exceptionally, the clause does not supply the basis for jurisdiction.¹⁶⁵⁸

In *Carnival Cruise Lines Inc v Shute*¹⁶⁵⁹ the terms and conditions of a cruise line contained an express and exclusive choice of forum (Florida). One of the passengers was injured in a fall onboard a ship and sued in the Western District of Washington- that suit was dismissed for lack of jurisdiction. The US Supreme Court held that jurisdiction clauses are upheld if they passed the judicial scrutiny of fundamental fairness. The Court said that it is not unreasonable for a cruise line to limit jurisdiction to one forum, as passengers come from different jurisdictions and the cruise line may otherwise risk being sued in multiple jurisdictions, ultimately constituting a cost factor, which will be passed on to consumers.¹⁶⁶⁰ Hence an express choice of jurisdiction could be in the interest of consumers, as a form of prudent risk management leading to lower prices. Furthermore the Court held that there was no evidence that the purpose of the jurisdiction clause was to make litigation inconvenient for the plaintiffs.¹⁶⁶¹ The Court gave short shrift to the argument that the claimants are physically and financially unable to sue in Florida and emphasized that a heavy burden of proof is required to set aside a forum selection clause on the grounds of inconvenience.¹⁶⁶²

The starting point of any analysis of a jurisdiction clause is that it must have been brought to the attention of the consumer.¹⁶⁶³ In *Specht v Netscape Communications Corp*¹⁶⁶⁴ the courts have made a distinction between 'browse wrap contracts', in which the consumer is merely given warning of terms and conditions (for example through a link on the homepage of a website), and 'click wrap contracts', where the

¹⁶⁵⁶ Michael Geist fn 1646, 1386 A similar issue arises in respect of arbitration clauses which will be discussed in Chapter 7-2.3

¹⁶⁵⁷ *The Bremen v Zapata Off-Shore Co* 407 US 1, 12-13; 92 S Ct 1907 (1972): 'a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect.' The US Supreme Court in that case also said that 'in the light of the present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside' 15

¹⁶⁵⁸ *ibid* and *Carnival Cruise Lines Inc v Shute* 499 US 585, 595 (1991); *Burger King Corp v Rudzewicz* 471 US 462, 486 (1985) and cases in fn 1670, 1671

¹⁶⁵⁹ *Carnival Cruise Lines Inc v Shute* 499 US 585, 595, 499 U.S. 972, 111 S.Ct. 1614 (1991)

¹⁶⁶⁰ *ibid* 593-594

¹⁶⁶¹ *ibid* 594-595

¹⁶⁶² *ibid*

¹⁶⁶³ *Spataro v Kloster Cruise Ltd* 894 F2d 44, 45-46 (2nd Cir 1990)

¹⁶⁶⁴ 306 F3d 17, 48 UCC Rep Serv 2d 761 (2nd Cir 2002)

consumer is forced to scroll through the terms and conditions and click 'I agree' or something equivalent before the contract is concluded. The Court found that the terms (in this case an arbitration clause) are not incorporated in a browse wrap contract, as the consumer may have easily missed the link to the terms and conditions¹⁶⁶⁵. Hence a jurisdiction clause in a 'click-wrap' contract is more likely to be enforceable than one contained in a 'browse-wrap' contract.¹⁶⁶⁶

More divisive is the application of the principles in *Carnival Cruise Lines*¹⁶⁶⁷ to the question whether a jurisdiction clause contained in a standard consumer contract concluded over the internet is valid. In particular the use of a standard jurisdiction clause in AOL's terms of service has created a spate of litigation about this issue in several States.¹⁶⁶⁸

On the one hand, consumers contracting on the internet are also likely to come from multiple jurisdictions, so arguably, a supplier would be justified in reducing the risk of being sued in multiple states. Hence, under this approach, jurisdiction clauses may be regarded as a legitimate form of risk management, particular in mass consumer transactions on the internet. Therefore some courts have followed the *Carnival Cruise Lines*¹⁶⁶⁹ line of argument.¹⁶⁷⁰

On the other hand, a jurisdiction clause in a consumer form contract may also deprive a consumer of protective laws in his or her local state, in particular of the right to bring a class action and/or make litigation inefficient if the value of the claim is small compared to the cost and inconvenience of bringing a suit in another state. Hence, some courts have found that a consumer jurisdiction clause in an internet transaction falls into the public policy exception and was unreasonable.¹⁶⁷¹

¹⁶⁶⁵ Fn 1664, 30-33, 35

¹⁶⁶⁶ *Caspi v. Microsoft Network, L.L.C.*, 323 N.J.Super. 118, 732 A.2d 528, 530, 532-33 (N.J.Super.Ct.App.Div.1999) – in this case upheld a forum selection clause, as the subscribers to online software were required to review the terms and conditions by scrolling through them and to click 'I Agree' or 'I Don't Agree'; in *Bruce G Forrest v Verizon Communications Inc* 805 A2d 1007, 1010 (DC Court of Appeals 2002) the Court also upheld a click-wrap contract forum selection clause.

¹⁶⁶⁷ Fn 1658

¹⁶⁶⁸ Fn 1670, 1671

¹⁶⁶⁹ Fn 1658

¹⁶⁷⁰ For example in *Bruce G Forrest v Verizon Communications Inc* the District of Columbia Court of Appeals upheld a forum selection clause stipulating Virginia as the forum, despite the fact that Virginia is one of two states that does not allow for class action procedures, Fn 1666, 1011-1013; similar reasoning can be found in *AOL Inc v Booker* 781 So.2d 423, 424-425 (Fla.Dist.Ct.App.2001) and in *Koch v AOL* 139 F.Supp.2d 690, 694-695 (D.Md.2000)

¹⁶⁷¹ *AOL v Superior Court (Mendoza)* 90 Cal.App.4th 1, 18; 108 Cal Rptr 2d 699 (Cal. App. 1 Dist. 2001); *Strujan v AOL* 819 N.Y.S.2d 213 (N.Y. City Civ. Ct. 2006), Unpublished; *AOL v Pasieka* 870 So.2d 170, 171-172 (Fla.Dist.Ct.App.2004); *Dix v ICT Group Inc* 125 Wash.App. 929, 937; 106 P.3d 841 (Wash.App.Div 3 2005)

2.4.5 Conclusion

The US approach to jurisdiction is based on general principles, which are flexible and therefore uncertain and unpredictable in their application. This potentially leads to forum-shopping as claimants are tempted to argue that the defendant has minimum contacts, even where the links to the forum are tenuous. This tendency is slightly, but not completely counter-balanced by a trend to base jurisdiction on targeting (so-called 'effects doctrine') rather than the interactivity of websites (or other internet applications). Such forum-shopping makes cross-border litigation expensive and this is ultimately to the detriment of both claimant and defendant. The situation is even more unsatisfactory for consumer and other small claims disputes. Different state courts interpret the exceptions to the general enforceability of jurisdiction clauses in different ways. As a consequence, business are concerned to be sued in a different state and consumers, likewise cannot be sure whether or not a jurisdiction clause will be enforced. The need for alternative mechanisms becomes, again, apparent.

3. Cross-Border Enforcement

Even if a claimant succeeds in finding a court of competent jurisdiction and that court rules in his or her favour, if the judgment debtor does not comply with its terms, the claimant needs to enforce the judgment. If the judgment debtor does not have any assets in the jurisdiction where judgment was given, the claimant has to enforce in a foreign jurisdiction. The courts in this foreign jurisdiction are under no obligation under international law to recognise and enforce that judgment¹⁶⁷², unless there is a bilateral or multilateral enforcement treaty. States may recognise and enforce judgments unless there is public policy or other ground which leads them to refuse recognition and enforcement. This has been enshrined in the notion of comity as described in the US Supreme Court case of *Hilton v Guyot*:

'Comity is neither a matter of absolute obligation nor of mere courtesy and goodwill. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its law'.¹⁶⁷³

It is important to note that in the US comity is more in the nature of mutual assistance¹⁶⁷⁴ and does not oblige a court to give effect to a foreign judgment and it

¹⁶⁷² P Schlosser 'Jurisdiction and International Judicial and Administrative Co-operation' (2000) 284 *Recueil des Cours* 9-430, 237

¹⁶⁷³ 115 US 113, 163-64 (1895)

¹⁶⁷⁴ Although, as *Peter Schlosser* points out, the rules on recognition and enforcement of foreign judgments are conceptually separate from those regarding judicial co-operation and mutual assistance, as the court giving the judgment and the court enforcing the judgment do not co-operate in the strict sense of the word. P Schlosser fn 1672 32-33; However he also notes that in the American point of view, transborder recognition and enforcement of judicial decisions is only a sub-category of international legal assistance together with transborder service of process and extraterritorial discovery. 35.

is usually based on good will and reciprocity.¹⁶⁷⁵ Although the doctrine of comity has played a role in England and Wales in the approach to recognition and enforcement of foreign judgments, it seems that it has been modified and superseded by a doctrine of *obligation*.¹⁶⁷⁶ The liability of the debtor of the foreign judgment is regarded as a legal obligation in and of itself, without any requirement of reciprocity by the foreign state.¹⁶⁷⁷

Whether seen from the viewpoint of international comity or obligation, enforcement of foreign judgments is not required by international law. Court can and do refuse to recognise judgments. In some circumstances this refusal to enforce can take a more active form. For example, an English court which does not agree with the conclusions of a foreign court about the validity of an exclusive jurisdiction clause pointing to the English courts¹⁶⁷⁸ can grant an anti-suit injunction (an order issued to a person in England demanding that such a person withdraw legal proceedings in a court outside England) in an effort to halt the foreign proceedings.¹⁶⁷⁹

Thus, although in many private disputes national courts are prepared to enforce foreign judgments, absent any bi-or multilateral agreements, there is no obligation on states¹⁶⁸⁰ to do so and they can (and sometimes do) invoke public policy or other grounds in denying enforcement. Thus, in some ways comity is the opposite of what it appears to be at first sight. The principle of comity allows states to invoke principles of national law to justify non-enforcement of a judgment. Thus the first point to note is that a judgment may not be enforced.

For enforcement of a foreign law judgment in England under the common law rules, essentially four conditions have to be fulfilled: (i) the original court must have been competent¹⁶⁸¹ (ii) the judgment must be final and conclusive, (iii) the judgment must be for a fixed sum of money and (iv) the judgment debtor must not

¹⁶⁷⁵ M Akehurst 'Jurisdiction in International Law' (1972-3)46 *British Yearbook of International Law* 145-257, 236; P Schlosser fn 1672 37

¹⁶⁷⁶ C Clarkson, J Hill fn 1543 133-134

¹⁶⁷⁷ P. Schlosser fn 1672 39

¹⁶⁷⁸ The foreign court not giving effect to the jurisdiction clause and holding itself competent *Roger Thomas Donohue v ARMCO Inc and others* [2001] ILPr 48 (CA), overturned by the House of Lords on different grounds, see [2001] UKHL 64

¹⁶⁷⁹ The Institut de Droit International at its Session in Bruges in 2003 has adopted a Resolution on anti-suit injunctions. It defines them as the 'practice of granting injunctions to restrain parties from commencing or proceeding in another country' (Recitals (b)). It states the anti-suit injunctions may be a breach of international comity (ibid (f)), but may be justified in certain circumstances, such as the breach of a choice of court agreement or arbitration agreement (Resolution 5 (a)).

¹⁶⁸⁰ An exception has been established between the EEA states, see Council Regulation 44 2001/EC of 22. December 2000 on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (replacing the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters except for Denmark)- under the Convention/Regulation the EEA states mutually recognise and enforce civil and commercial judgments of another EEA state (Articles 33 and 38), subject to only very narrow public policy grounds. Similarly, the individual states of the US are required to enforce judgements of other US states by operation of the "Full Faith and Credit" clause of the US Constitution. See US Constitution Art 4. Sec 1.

¹⁶⁸¹ This is only given if the judgment debtor has either submitted to the foreign court or is present there- it seems that a mere contact over the internet may is not sufficient. C Clarkson, J Hill fn 1543 138-139

be able to raise a defence (such as breach against natural justice, fraud, public policy or irreconcilable judgments).¹⁶⁸²

For enforcement of judgments rendered by a court in a EU Member State in another Member State, the Jurisdiction Regulation¹⁶⁸³ provides for recognition¹⁶⁸⁴ subject to very narrow public policy exceptions¹⁶⁸⁵ and a simplified enforcement procedure¹⁶⁸⁶. Hence within the EU Member States recognition and enforcement is somewhat easier than with other states (in the absence of a treaty). Under the EU rules, for example, the courts must not examine whether the original, foreign court was the competent court.¹⁶⁸⁷ The first stage of the application for enforcement is a purely formal *ex parte* procedure and the court will not consider any defences, which can only be raised if the judgment debtor appeals against the enforcement order.¹⁶⁸⁸ Hence the Jurisdiction Regulation proceeds from the premise that a judgment fulfilling the conditions is entitled to recognition and enforcement.¹⁶⁸⁹

However even if there is an obligation to recognise and enforce a judgment, there is still an *exequatur* (obtaining a declaration of enforceability/registration) procedure associated with this.¹⁶⁹⁰ The procedure involves appointing a local representative¹⁶⁹¹ and translation costs¹⁶⁹², which make it expensive for small claims¹⁶⁹³. This will be further discussed in the next section.

4. Cross-Border Aspects

As has been seen in the preceding sections, the rules of private international law are intricate, complex and uncertain in their application. Jurisdiction is frequently concurrent with different courts applying different laws, involving the need to determine the competent court and the applicable law by preliminary hearings or even anti-suit injunctions. Complexity means expense in terms of costs and delay. Further costs and delay are added if the judgment must be enforced against assets located in a foreign jurisdiction.

International litigation is not only complex, but also greatly expensive for reasons apart from conflicts of law and, but for the largest or most urgent claims, the costs of cross-border litigation will be disproportionate to the remedy sought. Even the

¹⁶⁸² C Clarkson, J Hill fn 1543 134 et sequi

¹⁶⁸³ See fn 1481

¹⁶⁸⁴ Art.33 (1) 'without any special procedure'

¹⁶⁸⁵ Art.34 (1) 'manifestly contrary to public policy' and subs (2) – (4); Art.36 the judgment may not be reviewed as to its substance

¹⁶⁸⁶ Art.38

¹⁶⁸⁷ Art.35 (3)

¹⁶⁸⁸ C Clarkson, J Hill fn 1543 162-163

¹⁶⁸⁹ *ibid*

¹⁶⁹⁰ An exception to this is enforcement in uncontested claims under Regulation 805/2004/EC OJ L143 30. April 2004, pp. 15-39, abolishing the *exequatur* procedure and allowing for direct enforcement.

¹⁶⁹¹ See for example Art.40 (2)

¹⁶⁹² Art.55 (2)

¹⁶⁹³ In the UK this may well cost between £500-£1000 for a small claim.

mere enforcement of a foreign judgment not involving high amounts does not economically make sense.¹⁶⁹⁴

As *P. Schlosser* has remarked with respect to the cost of international litigation:

‘For the little fellow, instituting proceedings abroad is in practice unaffordable. Normally he does not know how to find a lawyer in a foreign country. Thus he must contact a lawyer in his own country, who in turn, must engage and instruct his foreign colleague. Hence double fees are due. The fees of the lawyer consulted at home are seldom recoverable from the debtor (...) The costs for the translation of a judgment accompanied by extensive reasons may be enormous. The costs are seldom refundable.’¹⁶⁹⁵

Foreign proceedings are rendered more expensive by travelling (of the parties, lawyers and, as the case may be, witnesses) and translation costs. If foreign law applies, experts (legal advisors and advocates) on the foreign law must be instructed. Furthermore, foreign nationals suing in a foreign court frequently have to overcome discriminatory obstacles inbuilt in civil procedure. For example in many states foreigners instituting proceedings have to pay a deposit as security for the defendant’s costs and foreigners are discriminated against regarding legal aid.¹⁶⁹⁶

As a consequence, for foreign litigants the costs of international litigation are not infrequently prohibitive, as in many claims the legal costs are disproportionate to the value of the claim. It is impossible to give a precise figure of these costs here¹⁶⁹⁷ - this will depend on the costs of litigation in a particular jurisdiction, on the distance between the parties, whether lawyers bill by the hour or on a fixed fee basis (*eg* as a percentage of the value of the claim), whether costs are awarded to the winning party, on the availability of legal aid, whether there are translation costs etc. By way of example, in a straightforward debt enforcement action, the registration and enforcement of a German judgment in an English court under the simplified (*sic*) rules in the Jurisdiction Regulation EC/44/2001¹⁶⁹⁸ may well cost a thousand pounds sterling in translation and lawyers’ costs alone.

An empirical study on the cost of litigation in EU cross-border consumer disputes conducted in 1995¹⁶⁹⁹ found that if a consumer pursues a claim of Euro 2000¹⁷⁰⁰ at the place of the defendant’s residence the costs vary between Euro 980¹⁷⁰¹ and Euro

¹⁶⁹⁴ P Schlosser fn 1672 216

¹⁶⁹⁵ P Schlosser fn 1672 215

¹⁶⁹⁶ P Schlosser fn 1672 216

¹⁶⁹⁷ See also the discussion in Chapter 3-7

¹⁶⁹⁸ Articles 33-52

¹⁶⁹⁹ H von Freyhold, V Gessner, E Vial and H Wagner (Eds) *Cost of Judicial Barriers for Consumers in the Single Market*, A Report for the European Commission, Zentrum für Europäische Rechtspolitik an der Universität Bremen, October/November 2005

¹⁷⁰⁰ About £1344

¹⁷⁰¹ About £659

6600¹⁷⁰² depending on the combinations of Member States, with an average of Euro 2489¹⁷⁰³. The average duration of such litigation would be 23.5 months, almost 2 years. If a consumer pursues a claim of Euro 2000 at his or her state of residence and then enforces in the defendant's Member State the costs vary between Euro 950¹⁷⁰⁴ and Euro 5850¹⁷⁰⁵, again depending on the combination of Member States, the average costs being Euro 2437¹⁷⁰⁶. The average duration would be extended to 29.2 months, almost 2 1/2 years.¹⁷⁰⁷

Another example is the *Euromarket* case, which involved an application for summary judgment, *ie* a preliminary hearing, brought by a US company against an Irish trader.¹⁷⁰⁸ The judge pointed out when dismissing the application for summary judgment that

'In substance neither party trades in this country. Yet well over £100,000 in costs have been expended here. No one but a lawyer could call this rational. I expressed the firm view that the parties should attempt to reach settlement.'¹⁷⁰⁹

This cost factor poses serious problems for redress mechanisms in international e-commerce, especially in small claims. The cost of litigation, let alone cross-border litigation, has led to strong calls in government¹⁷¹⁰, academic¹⁷¹¹, professional¹⁷¹² and judicial¹⁷¹³ circles for an increased use of ADR mechanisms to settle small claims arising from e-commerce. For example *Veijo Heiskanen* writes:

'As a practical matter, given the expected relatively low average value of international consumer transactions, it is unlikely that extensive cross-border litigation involving international electronic consumer transactions will ever become a reality'¹⁷¹⁴

¹⁷⁰² About £4435

¹⁷⁰³ About £1673

¹⁷⁰⁴ About £ 638

¹⁷⁰⁵ About £3931

¹⁷⁰⁶ About £1638

¹⁷⁰⁷ See the Table on p. 123

¹⁷⁰⁸ And in this case the claimant brought proceedings against the defendant in *two* courts, in England and Illinois, see above 2.2.2 (d) and 2.4.2

¹⁷⁰⁹ *Euromarket Designs Inc v Peters and Crate & Barrel Ltd* [2001] FSR 20 (ChD) para 8. In addition the US company had started proceedings before its local court in Illinois, which led to a default judgment (on the jurisdiction issue), as, presumably the defendant could not afford to defend herself before that court.

¹⁷¹⁰ Art.17 of the E-commerce Directive 2000/31/EC published in OJ L178/1 of 17. July 2000 encourages the Member States to establish out-of-court dispute resolution mechanisms

¹⁷¹¹ A Patel 'Consumer protection and redress-the wider context' (2000) 3 *Electronic Business Law* 9-10. L Gillies 'A Review of the New Jurisdiction Rules for Electronic Consumer Contracts Within the European Union' [2001] *Journal of Information Law & Technology* (e-journal), V Heiskanen fn Error! Bookmark not defined. 38 et seq

¹⁷¹² J Gunn & W Roebuck 'White Paper on Alternative Dispute Resolution in a Supply Chain Transformed by On-Line Transactions' May 2001, available from the ecentre Legal Advisory Group

¹⁷¹³ See fn 215, 216

¹⁷¹⁴ V Heiskanen, fn Error! Bookmark not defined. 37

Not just in the context of e-commerce, but more generally there is a noticeable tendency to overcome the cost factor of (even merely domestic) litigation by the use of ADR. Courts in England have now accepted the importance of ADR in complementing litigation. Since the introduction of the Civil Procedure Rules the courts are under an obligation to encourage ADR¹⁷¹⁵, if appropriate, and the courts are empowered to impose cost penalties on parties who unreasonably refuse to participate in ADR¹⁷¹⁶. Furthermore, the courts have recognised the validity and enforceability of ADR clauses in commercial contracts.¹⁷¹⁷

5. A European Small Claims Procedure

Essentially, a small claims procedure is a simplified court procedure, allowing individuals to resolve a dispute before a court with a procedure entailing lower cost and more informality. Twenty OCED countries have such a simplified procedure.¹⁷¹⁸ These states limit the availability of the small claims procedure to claims below a certain monetary threshold, varying between Euro 300 and 30000.¹⁷¹⁹

This raises the question whether small claims procedures can help *specifically* with *cross-border* disputes. The preceding sections have shown the difficulties of litigating and enforcing a small claim in a cross-border action. In this context it is necessary to discuss the proposed European Small Claims Procedure.

The European Commission has proposed the establishment of a harmonized, pan-European Small Claims Procedure¹⁷²⁰, which would apply to cases in which the value of the total claim (excluding interest, expenses and outlays) does not exceed Euro 2000¹⁷²¹.

As has been discussed in this Annex, the obstacles to cross-border litigation in the form of disproportionate complexity, costs and delay stem from three factors: the complexity and uncertainty surrounding the application of jurisdictional rules, the formality of the court procedure itself and the formal requirements to achieve recognition and enforcement in a foreign jurisdiction.

¹⁷¹⁵ CPR Part 1.4 (2) (e); *Cowl v Plymouth City Council* [2002] 1 WLR 803 (CA)

¹⁷¹⁶ CPR Part 44.5; *Dunnett v Railtrack* [2002] 2 AllER 850 (CA); *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1841 (ChD) unreported, para 11-13; but cf *Hurst v Leeming* [2003] 1 Lloyd's Rep 379 (ChD), where the refusal to mediate was justified on the basis that there was no real prospect of success 381.

¹⁷¹⁷ *Cable & Wireless Plc v IBM* [2002] 2 AllER 1041 (Comm)-upholding the validity of an ADR clause.

¹⁷¹⁸ For claims between £201 and £20160; OECD Report 'Consumer Dispute Resolution and Redress in the Global Marketplace' 2006 p.24

¹⁷¹⁹ OECD Report 'Consumer Dispute Resolution and Redress in the Global Marketplace' 2006 p.26

¹⁷²⁰ Proposal for a Regulation establishing a European Small Claims Procedure, dated 15. March 2005, COM(2005) 87 final

¹⁷²¹ Art.1 (1) of the Proposal

5.1 Jurisdictional rules

If the proposed European Small Claims Procedure is adopted, the normal rules of jurisdiction in Regulation EC/44/2001 would be applied to the Procedure. Hence the Proposal does not avoid or simplify jurisdictional rules.¹⁷²²

5.2 Formality

Its main significance is that it would establish a harmonized procedure for small claims, which would apply as an alternative to already existing national small claims procedures.¹⁷²³ For example, the Proposal provides that the procedure should normally be conducted in writing¹⁷²⁴, providing for tight deadlines¹⁷²⁵, and leaves the presentation and admissibility of evidence to the judge's discretion¹⁷²⁶, hence adopting an inquisitorial approach. The Proposal expressly envisages the use of video-conferencing and other online technology for the collection and presentation of evidence (such as witness statements) and for hearings¹⁷²⁷. This Procedure would simplify the 'normal' civil litigation procedure, which is particular relevant for those Member States who at present do not have a simplified small claims procedure and whose litigation costs are very high. It would make European small claims litigation more informal.

5.3 Enforcement

Finally, as to enforcement the Commission's original Proposal was fairly brief, simply stating that the party seeking enforcement of a foreign judgment merely has to provide the judgment and a certificate by the court having issued the judgment to be enforced.¹⁷²⁸ The Report of the European Parliament¹⁷²⁹ proposes considerable amendments to the enforcement provisions. It stipulates that enforcement should be governed by the law in the Member State of enforcement, and that a European Small Claims judgment should be enforced under the same conditions as a domestic judgment.¹⁷³⁰ However it also states that, where necessary a translation must be supplied.¹⁷³¹ This could make enforcement expensive in relation to the value of the claim. It is difficult to see how this translation requirement can be avoided unless the courts in all Member States provide foreign language translation services.¹⁷³² The Proposed Regulation speeds up enforcement by providing that the enforcing

¹⁷²² Art.18 (1) of the Proposal

¹⁷²³ Recital 7 of the Proposal

¹⁷²⁴ Art.5 of the European Parliament's Report

¹⁷²⁵ See for example Articles 4 (2), (3), 5 (1) and 10 of the Proposal

¹⁷²⁶ Art.9 of the European Parliament's Report

¹⁷²⁷ Art.6(1) and Art.7 (1) of the Proposal

¹⁷²⁸ Art.18 (4)

¹⁷²⁹ Text adopted by Parliament on 14. December 2006-Strasbourg. Reference A6-0387/2006

¹⁷³⁰ Art.21 (1) Report of the European Parliament

¹⁷³¹ Art.21 (2) (b) Report of the European Parliament

¹⁷³² A translation requirement is also contained in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 3 adopted New York 10. June 1958, entered into force on 7. June 1959, Art.IV (2). The New York Convention is discussed in 6-2.6 of this thesis

party need not provide security for costs and that a judgment under the European Small Claims Procedure is enforceable notwithstanding the availability of an appeal¹⁷³³, unless the judgment has been challenged by the defendant¹⁷³⁴. Furthermore the Report of the Parliament also stipulates that enforcement can be refused if there is an earlier irreconcilable judgment in the same matter under certain conditions.¹⁷³⁵

5.4 Summary

Therefore while the European Small Claims Procedure would simplify enforcement, its main contribution is to provide a harmonized small claims procedure with a high degree of informality. Litigation and enforcement in a foreign jurisdiction, even under the small claims procedure still entails additional cross-border costs.¹⁷³⁶ Furthermore, its main limitation is that it only applies to very small value disputes, not exceeding Euro 2000¹⁷³⁷ and that it would obviously only be applicable within the EU/EEA.

6. Conclusion

The purpose of this Annex was to show that there is a 'jurisdictional challenge' for cross-border internet disputes.

For such disputes, litigation may involve multiple sets of private international law rules, even within the EU, despite some degree of regional harmonisation in the EU. Their application to internet disputes is uncertain and unpredictable. Activities on the internet are difficult to locate, since location is irrelevant for internet functionality. Hence the application of the rules may have surprising or ubiquitous effects and this uncertainty enables the parties to engage in 'forum shopping' entailing proceedings to determine jurisdiction and these by itself add significantly to the final legal bill and lead to further delay.

On an international level, absent any harmonisation of jurisdictional rules and an agreement of reciprocal enforcement, courts at the place where a defendant has assets may refuse to enforce a judgment. By contrast to litigation, arbitration awards are more easily enforced, as a consequence of the New York Convention.¹⁷³⁸ On a regional level in the EU this may be less of a problem, as for civil and commercial matters, recognition and enforcement of a judgment is guaranteed. However enforcement entails a separate procedure to declare a judgment enforceable and this entails additional costs and delay.

¹⁷³³ Art.13 of the Proposal

¹⁷³⁴ Art.23 of the Report of the European Parliament

¹⁷³⁵ Art.22 (1)

¹⁷³⁶ OECD Report 'Consumer Dispute Resolution and Redress in the Global Marketplace' 2006 p.28

¹⁷³⁷ About £ 1344 Sterling, this is much lower than the current small claims limit in the English courts, which is £5000 for most claims and £1000 for personal injury or housing disrepair. see CPR Rule 26.6 (1)

¹⁷³⁸ See 6-2.6 and 6-7

Cross-border litigation imposes higher costs and delay for the parties, because of the need to instruct a foreign lawyer (frequently in addition to a local lawyer), because of travelling costs of the parties and witnesses, translation costs and because enforcement is more expensive. For claimants the costs of international litigation are frequently prohibitive, as in small claims the legal costs are disproportionate to the value of the claim.

These factors mean for claimants that legal redress is practically unattainable and effectively, that access to justice is barred in small claim cross-border internet disputes.¹⁷³⁹ For defendants, the 'jurisdictional challenge' in internet disputes means that they may be sued in a distant foreign court or even multiple foreign courts and that such a dispute may be impossible to defend, again because of cost reasons, so that a default judgment becomes inevitable.

¹⁷³⁹ See also the OECD's conclusions in relation to consumers in OECD Report 'Consumer Dispute Resolution and Redress in the Global Marketplace' 2006 p. 44